

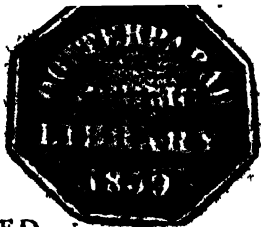
Reports Argued And
Reports Argued And
Determined In The
courts of common Pleas
Vol. 4

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C A S E S



ARGUED AND DETERMINED

1811.

IN THE

Courts of COMMON PLEAS,

AND

EXCHEQUER-CHAMBER;

IN

Trinity Term,

In the Fifty-first Year of the Reign of GEORGE III.

AND IN

Michaelmas Term,

In the Fifty-second Year of the Reign of GEORGE III.

BROUNCKER v. SCOTT.

June 18.

THIS was an action of *assumpsit*, brought by the Plaintiff to recover from the Defendant a compensation in damages for the detention of a certain ship of the Plaintiff beyond a reasonable time for the unloading of her cargo, after her arrival in the port of London. There were other counts for freight, primage, and demurrage due to the Plaintiff as master of the said ship. The Defendant, upon the counts for freight and primage paid money into court; and at the trial before Mansfield C. J., at the London Sittings after last Hilary term, the only question was, whether the Plaintiff, who

The master of a ship cannot maintain assumpsit in his own name upon an implied promise to pay demurrage.

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was not owner, but only master of the ship, was entitled to sue for demurrage. Upon this part of the case a verdict was found for the Plaintiff, with liberty to the Defendant to move to enter a nonsuit, if the Court should be of opinion that the Plaintiff was not entitled to maintain the action. Accordingly, *Lens* Serjts, in *Easter* term, having obtained a rule *nisi* for that purpose :

• *Shepherd* and *Best* Serjts. now shewed cause, and contended that the captain might maintain this action for demurrage. They said that demurrage was a claim arising in respect of the hire of the ship, for such time as elapsed after the expiration of the period stipulated for the completion of the voyage; and although not actually freight, it was in the nature of freight, being a reasonable recompence for the use of the ship. But by the usage of the maritime law, the captain is so far considered as a principal, that he may sue for the freight; because it is reasonable that he should receive his remuneration at the port to which the ship is destined; and therefore he may resort in the first instance to the consignees of the goods for the payment of the freight, out of which his remuneration is to arise; otherwise he might be delayed in obtaining it, if upon their refusal to pay he was compelled to seek it through the medium of his principals. The same reasoning is applicable to a claim for demurrage; and therefore the same right may be expected to follow. [*Mansfield* C. J. I have inquired, and find that there is not any instance of an action of this description. There are very few indeed where actions have been brought by the master for freight, and they have been supported upon the ground of an implied *assumpsit*, arising out of the bill of lading, by the terms of which the captain is to deliver the goods to the consignees, he or they paying freight for the same. But even this is quite a modern action.] Demurrage, as well

well as freight, is due before the delivery of the goods, and for non-payment of it the captain may withhold their delivery; and therefore if he does deliver them, an *assumpsit* may be implied, as well in the one case, as in the other. It is of great importance to merchants, who are carriers from port to port, and whose ships are absent for a great length of time, that the captain should be permitted to sue for demurrage, without the necessity of their interference.

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Lens and *Vaughan* Serjts. contra. It is a new principle that the captain has a lien on the goods for the payment of demurrage, and would involve this difficulty, that as the amount of the demurrage would be continually increasing by the detention of the goods, the delivery of them would never be demanded. It would also be new in maritime and commercial law, to hold, that the agent may sue in his own name in all cases where his principal would be entitled; yet that is the only ground on which this action can be sustained; for the captain can derive no benefit from the working of the ship, but only the owner, and so little is he interested in it, that it might reasonably be doubted, even if a promise were made to him to pay the demurrage, whether it would not be a *nudum pactum*.

MANSFIELD C. J. This is certainly an action *prime impressiois*, and is an experiment, which, it is not suggested, has been attempted before. It is a claim made by the captain of a ship upon a subject-matter in which he has no interest; and it is true, that even if he had been the contracting party, that contract would have been deemed to have been made by him for the benefit and on the behalf of his principal. Such being the case, I cannot see that necessity requires this action to be supported; and if not, its very novelty is a sufficient

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objection to it. How long ago it is, since an action brought by a captain of a ship for freight was first entertained, I do not know; but it is observable with reference to that species of action, that the bill of lading usually specifies "that the captain is to deliver the goods on payment of the freight," and if he delivers them without such payment, he becomes liable to his owner for so doing; it has been held, therefore, that he may maintain an action against the consignee upon an implied promise to pay the freight, in consideration of his letting the goods out of his hands before payment. But this form of action for demurrage without a special contract to that effect is not of long standing, even in the case where the owners of ships are the Plaintiffs; and as it generates a question whether the time elapsed was a reasonable time, and also what is a reasonable compensation for the use of the ship, it would be much better if it had not been encouraged, and if the owner had always made it a subject of special contract; but however that action may be supportable, I think it clear this cannot.

Per Curiam,

Rule absolute for a nonsuit.

June 18.

FEISE and Another v. BELL.

Under a licence to a *British* merchant by name on behalf of himself and others, to export to *P.* and to import a cargo thence, an alien enemy may lawfully be interested in the export cargo as well as in the import cargo.

THIS was an action on a policy of insurance *on goods* at and from *London* to *St. Petersburg*, on board the *Zeelust*. At the trial before *Mansfield C. J.* at the *London* sittings after last *Hilary* term, it appeared that the goods were the joint property of the Plaintiffs and of certain *Russian* subjects; that the ship sailed with a licence, which licence was granted to *Godfrey Feise* and *Co.*, merchants, on behalf of themselves and others, permitting them to load and export on board the vessel *Zeelust*, bearing any flag except the *French*, a cargo of *British*

manu-

manufactures, *British* and foreign colonial produce, *East India* goods, and such goods as were permitted by law to be exported, except cotton wool and hemp, from any port in this kingdom to any port in the *Baltic*, and to import from thence a cargo, also specified in the licence, to any port in the United Kingdom. It was objected that as this licence was granted to *Feife* and Co., merchants, on behalf of themselves and others, by the term others, *British* merchants only, or merchants *ejusdem generis* with *Feife* and Co. were comprehended, and not foreign merchants, and *a fortiori* not alien enemies. *Mansfield* C. J. over-ruled the objection, being of opinion that the licence ought to receive a more enlarged construction, and thereupon a verdict was found for the Plaintiffs, with liberty to the Defendant to move to enter a nonsuit.

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Leas Serjt. accordingly in the last term obtained a rule *nisi* for that purpose, against which

Best Serjt. now shewed cause, and relied principally on the case of *Menett v. Bonham*, (since reported, 15 *East*, 477.) which was an action on a policy of insurance on goods, at and from *London* to any ports in the *Baltic*, and the licence was to a *British* merchant (by name) and others, but the property was proved to be in alien enemies. A similar objection, as in this case, was taken and reserved at the trial, but the Court of *K. B.* upon motion made in this term, refused to entertain it, or grant a rule *nisi* thereupon. In *Fayle v. Bourdillon*, ante, *Easter* term 1811, vol. 4. the same point was determined, except that the licence there granted was to import a cargo into this country; but the construction must be the same whether applied to a licence to export from or import into this country: and in a late case of *Rucker v. Bennet*, Lord *Ellenborough* C. J. had held, where the interest was averred to be and was in a *Russian* enemy, yet as the underwriter, with a knowledge of that

B 3

fact,

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fact, had adjusted the loss, that the Plaintiff was entitled to recover against him.

Lens Serjt. contra. Unless the case of *Mennett v. Bonham* is to be considered as having decided this point, so as to preclude all further question, it may be argued that the government of this country, which is invested with the power of granting licences, ought to have the means of exercising a discretion as to the persons to whom those licences are to extend, and therefore that the terms used therein ought not to be strained beyond their natural import. It may be observed, also, that a licence to export from this country, and one to import into it, do not, as has been contended, stand precisely upon the same footing, so as necessarily to make the same construction applicable to both. In the case of a licence to import goods from a foreign country, the natural inference is, that the goods coming from a foreign country originally belong to foreigners; whereas, in the case of a licence to export from this country, the same inference leads to the conclusion that the goods belong to the subjects of this country. In this latter case, therefore, unless there be something extrinsic to intimate to the government that foreigners are interested in the cargo, the nature of the adventure itself will not do so, which if it did, perhaps the government might have withheld its licence. To hold therefore that it may be extended to protect the property of foreigners, will be to deprive the government of its option to grant or withhold a licence where they are concerned. ●

MANSFIELD C. J. We have seen instances where licences of a very special and limited nature have been confined to the particular grantees, but this licence is not of that description, but one of a more general nature. The form of it is to *Godfrey Feise and Co., merchants, on behalf*

behalf of themselves and others. It is therefore clearly, by the very terms of it, not to be restrained to the grantees alone, but is to be extended to others, and the question is who those others may be. Now it is said that others means *British* merchants, and in all respects such as the grantees, yet it is perfectly notorious that in a great commercial city, such as this metropolis, there are and must be many merchants who are not natives of the country where they carry on their merchandize, and there is nothing in this licence which intimates that it is to be restrained to such as are. Again, if we look to what may be supposed the object of this licence: that object was to facilitate the export of certain goods, such as *British* manufactures and colonial produce, in order to find a market for them abroad, to effect which the goods must be necessarily consigned to foreigners; and if so, how is it more injurious to the state to permit foreigners to export them in the first instance? It seems to me that a construction in favour of such a permission will rather aid than obstruct the object of the licence, by promoting the commerce of the country.

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HEATH J. A different construction from that which has been laid down by my Lord, would impede the commercial purposes for which the licence was granted.

Per Curiam,

Rule discharged.

● . SINCLAIR v. ELDERED.

June 19.

THIS was an action for maliciously and without probable cause arresting the Plaintiff, to which the Defendant pleaded the general issue. It appeared at the trial before *Lawrence J.* at *Guildhall*, at the sittings after *Hilary* term 1811, that the Plaintiff had been arrested

In an action for a malicious arrest the Plaintiff can recover no damages for extra costs, nor any damages unless malice be proved,

of which the first action, being non-prossed, is not of itself evidence.

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by virtue of a bill of *Middlesex*, indorsed for bail for 10*l.*; and had been discharged upon his attorney's undertaking to put in bail, which was accordingly done, and afterwards the Defendant suffered judgment of *non pros* to go against him. The Plaintiff paid for costs thirteen guineas, which were reduced to 1*l.* 1*s.* for the officers' fee, and 3*l.* 13*s.* 6*d.* for the other costs, so that his extra costs were 9*l.* *Lawrence* J. doubted at the trial, whether this judgment of *non pros* was sufficient evidence of the want of probable cause, and therefore directed the jury to find a verdict for the Plaintiff, with liberty to the Defendant to move to enter a nonsuit, the only damages upon which the Plaintiff insisted, and for the amount of which the verdict was given, were the extra costs in the first action. *Marshall* Serjt. accordingly in *Easter* term obtained a rule nisi to enter a nonsuit, on the authority of *Savile v. Roberts*, 1 *Salk.* 13. *S. C. Carth.* 416. *Purton v. Honnor*, 1 *Bos. & Pull.* 205. *Daru v. Savain*, 1 *Styl.* 424.

Best Serjt. now shewed cause. Admitting that a want of probable cause must be proved in order to maintain this action, there was sufficient evidence of it. This is not like the case of *Savile v. Roberts*, where it was held that it was not a sufficient ground to entitle a party to an action for a malicious prosecution, that the party against whom it is brought had failed in an indictment for a riot, preferred against the Plaintiff, for there the Defendant had taken all measures for the prosecution of his indictment. But in this case the Defendant never attempted to bring his action to a final termination, but voluntarily abandoned it, which is the best evidence to shew his opinion that there was no ground for it. In *Skinner v. Gunton*, 1 *Saund.* 228. it was held that an action lies for maliciously holding to bail.

Marshall Serjt. *contra*. This form of action was not known before the time of Lord *Holt*, when some cases of extraordinary malignity induced the Courts to entertain it.

it. In *Savile v. Roberts*, *Holt C. J.* says, that though the action lies, yet it is not to be favoured. The very circumstance of the Plaintiff having pleaded the statute of limitations to the action brought against him, seems to negative a want of probable cause. In *Purton v. Honnor*, it was determined that an action will not lie for vexatiously suing in ejection; and in *Gibson v. Chaters*, 2 *Bos. & Pull.* 129. Lord *Eldon C. J.* held, that there must be both a want of probable cause, and malice proved, to support the action. [*Lawrence J.* In that case the Defendant, who had received his whole debt, made an affidavit that the Plaintiff was indebted to him to that amount: according even to *Savile v. Roberts* the action might be maintained under such circumstances. *Heath J.* In that case the affidavit of debt was made before the payment of the debt.] If oppression had been the motive for suing, the Defendant would not have limited his affidavit of debt to 10*l.* *Dart v. Swain* is the first case of this description, and it is there mentioned as an exception to the general rule, the rule being, that a person cannot sue another because he has brought an unsuccessful action. The damages given indeed, were the amount of the extra costs only, but those costs can never be the increase of damages, for if they were, they might equally be recovered though no arrest had taken place. [*Lawrence J.* There was no inconvenience proved as a ground of damages. *Mansfield C. J.* Is there any case where an action has been maintained for extra costs?] *Best.* Not except in case of an arrest. [*Mansfield C. J.* The Plaintiff has recovered already in the shape of taxed costs all the costs which the law allows, and it cannot be that an action may be sustained for the surplus.]

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MANSFIELD C. J. This is certainly a new species of action, I mean considering it as an action to recover the extra costs, for there was no proof of any inconvenience
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of any sort arising to the Plaintiff, except in the payment of more costs than the law allows him, and which therefore he ought not to recover. With respect to the malicious arrest, there never was a period when this species of action ought more to be encouraged, for there is much abuse made of the power of arrest; but I do not think that the circumstance of not proceeding in an action, is, alone, evidence sufficient to support this action, and to prove malice: such a circumstance is very consistent with the case of a person who might have an acknowledgment of a debt contained in a letter, which might be lost since the commencement of the action, or with the death of a witness who alone was able to prove the debt, and so the party may be deprived of all the means of proceeding. There never has yet been a case, where the mere not proceeding in an action has been held evidence of itself alone sufficient to support this action. The rule, therefore, for entering a writ of *consequitur* must be made

Absolute.

June 19.

HAW v. GLE.

The several covenant of one grantor of an annuity is not avoided by the infancy of another who grants in the same deed.

COVENANT. The declaration stated, that by indenture made on the 27th of *March* 1809, at *Westminster* in the county of *Middlesex*, between the Defendant and *D. Moncrieffe* of the first part, *H. Cartwright*, *J. Tiesane*, and *H. Pullen*, of the second part, and the Plaintiff of the third part, one part of which indenture, sealed with the seal of the Defendant, the Plaintiff brought into court, the Defendant and *D. Moncrieffe* did thereby jointly for themselves, their heirs, executors, and administrators, and each of them severally, separately, and apart from the other of them, did thereby

for himself, his heirs, executors, and administrators, covenant, promise, and agree with the Plaintiff, that they, or one of them, or one of their heirs, &c. would, during the term of 100 years, if they or the survivor of them should so long live, pay to the Plaintiff an annuity of 150*l.* by quarterly payments. The declaration then stated a covenant on the part of the Defendant and *D. Moncrieffe* to attend at the *Pelican* or other life insurance office, in order that the plaintiff might obtain a policy on the life of each or either of them, and that they would not, during the continuance of the said annuity, go on the seas, or in parts beyond the seas, without giving the Plaintiff as early notice as might be, and that in case the Plaintiff should pay any additional rate of insurance, by reason of their going on the seas, or beyond the seas, that they would reimburse the same to him. The declaration then alleged that the Defendant and *D. Moncrieffe* went on the seas, and in parts beyond the seas, previous to which the Plaintiff had insured a certain sum on the life of *D. Moncrieffe*, and that the Plaintiff afterwards paid the sum of 34*l.* 9*s.* 4*d.* as an additional rate of insurance by reason of the said *D. Moncrieffe's* going on and beyond the seas, of which the Defendant and *D. Moncrieffe* had notice. It then alleged a breach in the non-payment of this additional rate. The Defendant, after craving oyer of the indenture, pleaded, 1st, *non est factum*; 2dly, that *D. Moncrieffe*, on the 27th March 1809, sealed and as his act and deed delivered to the Plaintiff the said supposed indenture, and that at the time of making the same, and when the same was sealed and delivered by the Defendant and *D. M.*, the latter was an infant under the age of 21 years, to wit, of the age of 20 years, to wit, at *Westminster*. To this plea there was a general demurrer and joinder thereto.

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Best Serjt. supported the demurrer.

Lens

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Lens Serjt., for the Defendant, relied upon the stat. 17 G. 3. c. 26. s. 6. "that all contracts for the purchase of any annuity with any person being under the age of 21 years, shall be and remain utterly void," and as the contract was entire, and could not be bad in part and good as to the remainder, it was therefore void also with respect to the Defendant. He said that it made no difference that the consideration money was to be divided between the two grantors, there being but one contract by which they were bound, and it was not the object of the act that where an infant was a party to such contract, he alone should be personally released from it, for the common law would have protected him to that extent; but the statute made the whole transaction void as well with respect to the co-obligors and sureties, as the infant.

MANSFIELD C. J. The statute does not say simply that the contract shall be utterly void, but void notwithstanding any attempt to confirm the same after the infant shall have attained the age of 21 years, so that the legislature was aware that the contract made by an infant was void at common law. It would be monstrous if it should be void; for suppose a young man left with 10,000*l. per annum*, which is directed to accumulate until he is of age, if a guardian, for the necessary subsistence of the young man, or his education, agrees to raise money by this mode of annuity, and the guardian joins therein for security, it would be very hard if this security could be vacated.

LAWRENCE J. One is inclined against this annuity, which is for the lives of two young men at 6½ years purchase only, if it was possible to set it aside.

CHAMBRE J. The person who joins in the annuity is sufficiently punished if it is an improvident grant, by being left to bear the expences of the annuity.

• *Per Curiam,* • Judgment for Plaintiff. •

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READSHAW v. WOOD and ATKENS, Esqrs
Sheriff of MIDDLESEX.

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THIS was an action against the defendants for a false return to a writ of *venditioni exponas* issued at the suit of the Plaintiff. The declaration stated that the plaintiff heretofore, to wit, in *Trinity* term, in the 45th year of the king, in the court of our said lord the King, before the king himself, by the consideration and judgment of the same Court, recovered against one *Augustus Beevor*, clerk, a certain debt, &c. as by the record and the proceedings thereof, still remaining in the same court, would more fully appear; and that Plaintiff afterwards sued and prosecuted out of the said court a *testatum fieri facias*, directed to the sheriff of *Middlesex*, by which writ our lord the king commanded the sheriff that of the goods and chattels of the said *A. Beevor* in his bailiwick, he should cause to be levied the debt and damages aforesaid, &c. At the trial of this cause before *Mansfield C. J.* at the *Westminster* sittings after last *Hilary* term, it appeared upon the production of the office copies of the proceedings, that the judgment was a judgment in debt against *Augustus Beevor* and *Charles Morley Balders*, and that the *testatum fieri facias* directed the sheriff to levy of the goods of *A. Beevor*, as well a certain debt of 2100*l.* which *C. B. Readshaw* had recovered against him, as also 80*s.* awarded to the said *C. B. Readshaw* for his damages, &c. and costs, whereof the said *A. Beevor* is convicted, as appears to us of record. Upon this evidence it was objected

An averment of a judgment obtained against *A. B.* is not proved by evidence of a judgment against *A. B.* and *C. B.*

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objected that there was a variance between the declaration, which set forth a judgment against *A. B.* alone, and the judgment proved, which appeared to be a judgment against *A. B.* and *C. M. Readshaw* jointly, and also that the writ of *testatum fieri facias* did not pursue the judgment, but was against *A. B.* alone. A verdict was found for the Plaintiff, with liberty to the Defendant to move to enter a nonsuit.

Best Serjt. accordingly, in the last term obtained a rule *nisi* for that purpose, against which *Vaughan* Serjt. now shewed cause, and contended that the alleged variance was immaterial in this case, as the recital of the judgment was matter of inducement only, and, if defective, might be rejected as surplusage. He insisted, however, that there was no defect in that recital, which was well maintained by the proof: for it did appear, according to the allegation in the declaration, that the Plaintiff had recovered against *A. B.*; and although the judgment included also another, it was not upon that account the less a judgment against *A. B.* He relied on the case of *Hendrey v. Spencer*, cited in *King v. Pippet*, 1 *T. R.* 238., which was an action by the high bailiff of *Westminster* against the Defendant in the nature of an escape. The declaration set forth a *latitat* against *Donner* and *J. Doe*, with an *ac etiam* against *Donner*, and the writ produced in evidence was against *Donner* and two others, and not against *J. Doe*. It was objected that there was a variance between the declaration and writ, inasmuch as a writ against *Donner* and two others could not be the same as a writ against *D.* and *J. D.* On the other hand, it was contended, that the only question was, whether such a writ had issued as warranted the arrest of *Donner*; and that had been proved. Lord *Mansfield* over-ruled the objection, and said this was a sufficient writ to warrant the arrest, which

which was all that was necessary. So in this case it was unnecessary to set out more of the judgment than was enough to support the writ of execution against *A. Beevor*, the false return to which is the gift of the action, the rest being mere inducement. Enough is stated to warrant the execution against *A. Beevor*, and though the judgment is jointly against another, *A. Beevor* is liable for the whole.

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LAWRENCE J. A plaintiff cannot have a separate execution on a joint judgment; but in the case cited, though the *latitat* was against *Donner* and two others, yet the Plaintiff might in the King's Bench have declared against *Donner* only. Here the Plaintiff has not contented himself with stating the delivery of the writ to the sheriff, and the false return thereto, but has gone further, and stated a judgment and a writ issued conformably thereto; but upon the production of the evidence the judgment appears to be different, and such a does not authorize the writ. If the Plaintiff states the judgment, he undertakes to prove it, but a judgment against two cannot be taken to be the same as a judgment against one only.

Best, contra, was stopped by the Court, MANSFIELD C.J. concurring with LAWRENCE J.; and thereupon the rule was made

Absolute.

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June 19. PEACEABLE, on Demise of UNCLE, v. WATSON.

The declarations of a deceased occupier of land of whom he held the land, are evidence of the seisin of that person.

But it must first be shewn that the land the deceased occupied was the land now in the tenant's possession.

THIS was an ejectment brought to recover possession of three houses at *Wishbeach*. Upon the trial at the *Cambridge* spring assizes 1811, before *Große J.*, the counsel for the Plaintiff, whose lessor claimed the premises by descent from *Robert Farthing*, in order to shew the seisin of *Robert Farthing*, asked a witness if he had known one *Clarke* now deceased, and upon his saying yes, asked if he had ever heard *Clarke* say of whom he rented the houses which he occupied in *Wishbeach*. The counsel for the Defendant objecting to this question, *Große J.* refused to permit it to be put, and the Plaintiff, being unable to prove his title without this evidence, was nonsuited. Another objection was also raised by the Defendant, that the term alleged to be demised to the Plaintiff had expired before the trial, but that objection was over-ruled at the trial, and the rejection sanctioned by the Court afterwards, who said it might be cured by amending.

Peckwell Serjt. in *Easter* term had obtained a rule nisi to set aside the nonsuit and have a new trial, upon the ground that evidence of the declarations of a deceased tenant may be received to shew who was his landlord.

Sellon Serjt. in this term, shewed cause against this rule, on the ground that the question was inadmissible, because no foundation had been laid by any previous question to shew where the houses were situated which *Clarke* had occupied, or that they were the houses for which this ejectment was brought, or that the Defendant was in possession of them.

Blisset

Blisset Serjt. shewed cause, The evidence would have shewn, as well the identity of the premises, as the seisin of *Robert Farthing*. The answer would have shewn, that the premises, of which the witness was speaking, were in the seisin of the Plaintiff's lessor's ancestor, and by the Plaintiff's opening it appears, that he goes for those houses of which his ancestor was seised. But this objection upon the identity of the premises was never taken at the trial; the evidence was rejected upon the broad ground, that the declarations of the deceased tenant were inadmissible.

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The learned Judge's report, however, stated that there had been no sufficient foundation laid to introduce the question.

MANSFIELD C. J. The opinion of *Grove J.* is unanswerable. The ground of the rejection is this. Possession is *prima facie* evidence of seisin in fee simple: the declaration of the possessor that he is tenant to another, makes most strongly, therefore, against his own interest, and consequently is admissible, but it must be first shewn that he was in possession of the premises for which the ejectment is brought. The learned Judge's report however seems to go further, and to intimate that he should have rejected the evidence of the declarations, whether there had or had not been other evidence to identify the premises which *Clarke* held, as those that were sued for.

LAWRENCE J. The Plaintiff must know, or ought to know, what premises he goes for, and he must first shew that the Defendant is in possession of the premises sought to be recovered, and next, that the Plaintiff has a better title. But since the learned Judge was of opinion,

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nion that, after those facts were proved, the declarations still would not be evidence, there ought to be a new trial.

Rule absolute.

June 19.

NIX v. CUTTING.

In an action of trover for a horse, a witness is competent to prove that the Plaintiff agreed that he (witness) should take the horse as a security for money due to him from the Plaintiff, and should sell it if the money was not paid on a day certain, which being the case, the witness accordingly sold the horse to the Defendant; for the verdict obtained on his evidence will not avail him in an action to be brought against him by the Plaintiff.

TROVER for a poney. The only question was, whether a person of the name of *Denny*, who had been admitted to give evidence on behalf of the Defendant, was an admissible witness. The evidence which the witness gave was to the following effect; that it was agreed between the Plaintiff and himself that he (the witness) should take the poney as a security for the payment of a sum of 15*l.* before that time deposited by him with the Plaintiff, and that the poney should be sold at the next *Woodbridge* fair if the money was not paid by that time. In consequence of the above agreement, the witness took the poney, and the money not having been paid, sold it at *Woodbridge* fair to the Defendant. *Grise J.*, before whom the cause was tried at the last assizes for the county of *Suffolk*, was of opinion the witness was admissible, and received his testimony, and the jury found a verdict for the Defendant. In *Easter* term *Scillon* Serjt. obtained a rule *nisi* for a new trial, on the authority of the case of *Bland v. Ansley*, 2 *N. R.* 331., insisting on the incompetency of the witness, inasmuch as he was interested in warranting his title to sell to the Defendant.

Blisset Serjt. now shewed cause, and distinguished this from the case of *Bland v. Ansley*, where he said the witness was most immediately interested; for the effect

of a verdict in that case in favor of the Defendant, for whom he was called as a witness, would have been, to satisfy an execution then issued against his goods, and to deliver him therefore from all further liability in respect of that execution: but this was only the ordinary case of proving one person divested of property by the evidence of another, to whom he has parted with it. Here the witness, by virtue of the special agreement made between him and the Plaintiff, stood in the situation of a purchaser from him of the poney, and under that agreement was entitled to hold the property. But in case an action should be brought against him to recover it back, this verdict would be no evidence for him in such action, nor could it avail him in any way.

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Sellon Serjt. contra. It is not necessary, in order to disqualify a person from being a witness in a cause, to shew that the verdict obtained in that cause may be used either as evidence for or against him. That indeed is one, but not the only ground of disqualification. And the question is whether this case does not also afford another. Here the Plaintiff established a *prima facie* case, which must have prevailed, unless the witness, by making himself the principal, and the Defendant only the agent, can shift the responsibility from the Defendant upon himself. In order to do this, he was first permitted to prove a debt due from the Plaintiff to himself, which he was clearly incompetent to do, and then that the property became his, and was not the plaintiff's, which he was directly interested to prove, after having made a sale of and thereby warranted it to be his property to the Defendant, to whom he would be liable over in case it turned out to be the Plaintiff's. In this view of the case, therefore, the cause was in reality the cause of the witness.

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v.

CUTTING,

MANSFIELD C. J. The question is, whether the witness, who bought a horse of the Plaintiff, is competent to prove that fact. I cannot possibly see any objection to his proving it, for as between the witness and the Plaintiff, or the witness and the Defendant, the verdict which is obtained upon his testimony in this cause, will be of no avail to him.

LAWRENCE J. The case of *Bland v. Ansley* is clearly discernible from this: for in that case there was an execution pending against the witness, from which he would have been relieved by a verdict given conformably to his testimony.

Per Curiam,

Rule discharged.

June 20.

DOE, on the Demise of DYKE and Others, v.
WHITTINGHAM.

A deed which may take effect as a covenant to stand seised, is good, though the use is to arise after the decease of the covenantor, and though he does not affect thereby to dispose of the freehold in the meantime.

And although the use is to arise at a period

which may not happen till long after the covenantor's death, the use resulting in the mean time.

A deed which is produced, stamped with the stamp required by 48 G. 3. c. 149, is admissible in evidence, although it has not affixed the deed stamp, of less value, required by the statutes in force at the time when such deed was executed.

THIS was an ejectment brought to recover a messuage, garden, and two acres of land in the parish of *Gnosfold*. Upon the trial before *Lawrence J.* at the last spring assizes for the county of *Stafford*, it appeared that *Edward Bate*, being seised of the premises, on the 22d of *March* 1787, executed on unstamped paper an instrument in the form of a deed-poll, entitled at the top, "A deed of gift," and expressing that he, "*Edward Bate*, in consideration of the love, good will, and affection which he had and did bear towards his loving

daughter

daughter *Margaret*, the wife of *John Whittingham*, the Defendant, had given and granted, and by those presents did freely give and grant unto the said *Margaret Whittingham*, her heirs, executors, or administrators, (after the deceases of himself and his then wife,) the premises therein mentioned, as a gratuity for money which his said daughter had lent him, to hold the premises, (from and after the decease of him and his then wife,) absolutely, without any manner of condition, otherwise than what was above mentioned." It was signed, sealed, delivered, and attested. On the 5th of *June* 1793 he made his will, duly executed and attested to pass real estates, and after having thereby devised all his real and personal estate to his wife for her life, and having devised after her decease unto his daughter *Margaret* the premises comprized in the above-mentioned deed of gift, for the said *Margaret Whittingham* to have, hold, occupy, possess and enjoy all the said premises, with every of their appurtenances, he willed that all the rest of his worldly estate should be equally shared among the rest of his children. The testator died in the year 1794, and the Defendant *John Whittingham* and *Margaret* his wife entered and were seised: in consequence of the decease of *Margaret* the wife in *April* 1799, this ejectment was brought by the other children and a grandchild of the testator, claiming the reversion in fee under the residuary devise. At the trial the deed of gift appeared stamped with the 30s. deed stamp which was in use for deeds in the year 1811; and it was alleged that the stamp, which was in use for similar instruments in the year 1787, was obsolete and destroyed, and could not now be obtained at the stamp office. Two objections were made at the trial; first, that this instrument could not take effect, because it purported to create a freehold estate *in futuro*; secondly, that it could not be received in evidence, unless stamped with the particular deed

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stamp which was by law required at the time of the execution of the deed. *Lawrence J.*, however, on both points thought otherwise, and the jury, under his direction, found a verdict for the Defendant.

Shepherd Serjt. in *Easter* term obtained a rule nisi to set aside the verdict, and enter a verdict for the Plaintiff.

Best Serjt., who was in this term to have shewn cause against the rule, was stopped by the Court.

Shepherd contended that this case was distinguishable from *Doe ex dem. Wilkinson v. Tranmer*, 2 *Wils.* 75. S. C. more fully *Willes*, 182.; that in the case cited, the estate of freehold remained in the re-lessor during his life, and upon his decease descended to his heir, who would be seised to the use of the use. But in this case an intermediate estate of freehold was intended to intervene, namely, to the grantor's wife, for it is as if he had said, I intend that the estate shall be by some means conveyed, after my own decease, to my wife for her life; and after her decease, I covenant to stand seised of it to the use of my daughter, the Defendant's wife, and her heirs; but there are no apt words by which if he had died, living his wife, the estate which he contemplates his intention to limit to his wife, could have taken effect; therefore the heir would not stand seised to her use, and then the ulterior estate to his daughter must fall to the ground, for want of any present estate of freehold to support it.

HEATH J. Here, after the death of the covenantor, there would be a resulting use. The mischief against which the law intended to provide was, that there might be no tenant to the precipe, but that would not happen in the present case.

LAWRENCE J. The case in *Willes* decides, that a covenant to stand seised, where the use is to arise at a future time is good: here the use will arise after the death of the wife.

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The objection upon the stamp was abandoned.

Rule discharged.

DOE, on Demise of BARBER, v. LAWRENCE.

June 20.

THIS was an action of ejectment brought to recover certain premises upon a forfeiture committed by an under-tenant by the breach of covenants contained in a building lease, which was made between *John Barber* and *Peter Reynolds*, a trustee for *Barber*, of the first part; *James Collins*, of the second part; *Robert Collins*, of the third part; and *John King*, the original lessee, of the fourth part; and recited the state of the title, which was, that *Robert Collins* being seised in fee, had mortgaged to *Reynolds* in trust for *Barber*, so that the legal estate was in *Reynolds*, and he had made a second mortgage to *James Collins*. All these parties were made to join in the demise to *King*, and the entry upon breach of covenant was reserved to the several *cestui que trusts* and trustee together: *Reynolds* alone of all the parties, had never executed the lease. Upon the trial at the *Westminster* sittings after *Hilary* term 1811, before *Heath J.*, a verdict passed for the Plaintiff.

A right of entry cannot be reserved to a stranger to the estate.

Shepherd Serjt. in *Easter* term obtained a rule *nisi* to set aside the verdict and have a new trial upon the ground that a right of entry could not be reserved to a stranger to the estate, and the lease shewed the legal estate to be in *Reynolds*. *Co. Litt.* 214.

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Best Serjt. in this term, contended, against this rule, that the covenant of the lessee that the *cestui que trust* might re-enter, estopped him from taking this objection, and next, that the first mortgage being paid off, the equitable estate of *Barber*, and legal estate of *Roynolds*, were at an end. But the Court, asking for the proof of the re-assignment, held that the case was too clear for argument, and made the

Rule absolute.

June 20.

JACKSON and Another v. ANDERSON and Others.

J. F. advised the Plaintiffs that he had remitted to them 1969 dollars, consigned to *Laycock*.

Laycock received 4700 dollars, and pledged the bill of lading to the Defendant, who received the price of the dollars at the bank of

England, where they were deposited for safe custody, on a sale of them to the bank.

Held, 1. That the letter was a sufficient appropriation of the dollars to the Plaintiffs. 2. That

the Plaintiffs and Defendant were not joint-tenants, or tenants in common of the dollars. 3. That although no specific dollars had been severed for the Plaintiffs, yet,

as the Defendant had converted all the Plaintiffs' and all his own, trover would lie for Plaintiffs' share. 4. That although the dollars remained in the same unaltered custody, yet the delivery, by the Defendant, of the bill of lading, which was the

symbol of them, and the receipt of the value, was a conversion.

TROVER for 3000 pieces of foreign coin called *Spanish* dollars. The Plaintiffs were the surviving partners of *Sadler, Jackson, and Co.*, merchants, of *London*; the Defendants were bankers there. In 1808, *Sadler, Jackson, and Co.*, consigned to *Mr. J. Fielding*, resident at *Buenos Ayres*, an assortment of linen goods for sale, which he accordingly sold, and rendered them an account of the proceeds calculated in dollars, and annexed to the following letter: "*Buenos Ayres, August 28, 1809. Messrs. Sadler, Jackson, and Co. Gentlemen,* Annexed I hand you an account of sales of four trunks, net proceeds 1969 *Spanish* dollars, which amount I shall ship per the *Cheerly* gun brig, Lieutenant *Fullarton*, who will sail direct for *England* in 10 or 14 days; this being a direct and safe conveyance, I deemed it more your interest, than sending them to *Rio*, more especially as the exchange has considerably fallen there." Signed,

J. Field-

J. Fielding." Some time afterwards the Plaintiffs received the following letter, which was brought by the ship *Cheerly*: "*Buenos Ayres, 12th Sept. 1809.* Gentlemen, I have by this conveyance sent to my friends Messrs. *Laycock* and Co. a bill of lading for a barrel of dollars, marked $\frac{1}{P}$ 100, in which are included 1969 for you and on your account, which sum will be rendered to you by said gentlemen. Signed *J. Fielding.*" Addressed to Messrs. *Sadler, Jackson, and Co., per Cheerly, Captain Fullarton.* Upon the receipt of this letter the Plaintiffs referred to *Laycock* and Co., who after repeated applications made to them, returned for answer that they had transferred the bill of lading to a friend. In consequence of this answer the Plaintiffs made inquiry at the Bank of *England*, and there discovered that the barrel of dollars upon its arrival had been deposited at the Bank, and that the bill of lading, indorsed severally by *J. Fielding, Laycock* and Co., and the Defendants, had been transmitted to the bullion office by the Defendants, of whom the Bank had purchased the dollars, and paid them the sum of 1098*l.* 13*s.* 9*d.*, being the value of 4718 dollars contained in the barrel: which sum the Defendants carried to the credit of *Laycock* and Co., with whom they had an account as bankers. Upon this the Plaintiffs demanded the 1969 dollars of the Defendants, who refused to deliver them up. This cause was tried before *Mansfield C. J.* at the *London* sittings after last *Hilary* term, when the Defendants endeavoured to shew that the consignment of this barrel of dollars to *Laycock* and Co. was not the same transaction with that in which the 1969 dollars were included on account of the Plaintiffs; but the jury being against them on that point, they relied principally on their right to retain them under the bill of lading indorsed to them by *Laycock* and Co. for a valuable consideration: upon this point the jury, under the direction of the learned

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. Chief

1811. Chief Justice, found a verdict for the Plaintiffs for 418*l.* 18*s.* 9*d.*, being the value of the 1969 dollars, with liberty to the Defendants to move to enter a nonsuit. Accordingly in last *Easter* term.

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Shepherd Serjt. obtained a rule *nisi* for that purpose; against which

Best Serjt. now shewed cause, and maintained that the 1969 dollars were clearly the property of the Plaintiffs, and that *Laycock* and Co. had no authority to dispose of them, and that having no title themselves, they could convey none by such disposal to the Defendants. He said it might be admitted that in general an indorsement of a bill of lading by the owner of property, operated as an assignment of such property to the person to whom it was indorsed, and that the whole interest of the indorser would thereby pass to him: but in this case *Laycock* and Co. had no interest to pass, as they were the mere agents of *Fielding*, for the purpose of handing over a specific number of dollars before enumerated and appropriated by him to the Plaintiffs. The relation of *Laycock* and Co. with respect to these dollars was merely that of a servant, and there could be no doubt, if a servant should dispose of his master's property, that the master might recover it back. [The Court here interrupted *Best*, and intimated a strong doubt, as there was nothing to distinguish the 1969 dollars from the remaining contents of the barrel, whether they could be considered as such specific property for which trover would lie.] That point was not made at the trial, but if it had been, it might be answered that however strong the objection might be, if this were an action of detinue, where more certainty is required than in this form of action, inasmuch as it lies for the recovery of the goods *in specie*, yet in trover, which is
for

for the recovery of damages only to the value of the goods, the objection does not apply. [*Lawrence*'] observed that the damages in trover were for the conversion of a specific thing; and also enquired how the indorsement of the bill of lading by the Defendants, which according to *Bell's* argument did not transfer any property to the Bank, but was inoperative and merely void, could be considered as a conversion by them: and whether this action, if it could be maintained at all, did not rather lie against the Bank, in whose possession the dollars were.] Without the intervention of the Defendants for their indorsement of the bill of lading, the Bank would have had no colour of title, and therefore that act is sufficient to constitute the Defendants guilty of a conversion, which implies only that the party has affected to dispose of, and not that he has made an effectual transfer of the property. Such was the doctrine held in *6 East*, 538., *McCombie v. Davies*, and accordingly Lord *Ellenborough* C.J., who in giving judgment in that case, cited and adopted the language of Lord *Holt* in *Bulldwyn v. Cole*, *6 Mod.* 212., is reported to have said, that the very assuming to oneself the property and right of disposing of another man's goods is a conversion.

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Shepherd and *Vaughan* Serjts. *contra*. Admitting the barrel consigned to *Laycock* and Co. to be the same from which the 1969 were intended to be appropriated to the use of the Plaintiffs, still there has not been any such appropriation of them as will entitle the Plaintiffs to this form of action; and although this was not made a ground of objection at the trial, yet that is no reason for the Court's refusing to entertain it now, if upon argument it appear to be a substantial point. The objection is, that there has not been any act done in respect of the 1969 dollars claimed by the Plaintiffs, to separate them from the rest so as to enable the Plaintiffs to designate them as
their

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their own property; the absence of which circumstance mainly distinguishes the case from that of *McCombie v. Davies*, where there was an actual transfer of the specific goods into the Defendant's name, which was equivalent to an appropriation of them to the Defendant: but in this case, when a demand was made by the Plaintiffs of the dollars, if the Defendants had desired them to point out which dollars were their property, they could not possibly have ascertained them, which shews that neither trover nor detinue will lie. But supposing them to be the distinct property of the Plaintiffs, still there has been no conversion by the Defendants, for they were never in possession of any part of the dollars, (the bank having been the depositaries of them from the time of their landing until the sale by the Defendants,) and a bare indorsement by them of the bill of lading, by means of which they obtained from the bank the value of the dollars, does not amount to a conversion. [*Heath J.* If the goods were in the disposition of the Defendants, it is sufficient to constitute a conversion if they wrongfully disposed of them, for they need not be in their actual possession. *Mansfield C. J.* They were virtually in the possession of those who had the bill of lading, though deposited for safe custody at the bank.] They can scarcely be said to have been in any other possession than that of the bank, for the consignee of dollars never expects to receive from the bank the specific dollars, but only the value of them. But, at all events, under the bill of lading, which was purchased for a valuable consideration, the Defendants had a right to dispose of the dollars before notice of the Plaintiff's interest in them, and that right cannot be defeated by any subsequent notice. It is also clear that no action would lie against *Laycock and Co.*, for they were joint-tenants with the Plaintiffs of these dollars, and one joint-tenant may lawfully dispose of the whole: and if that be so, *à fortiori* this action can-

not be maintained against the Defendants, who were merely the agents of *Laycock* and Co.

Cur. adv. vult.

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ANDERSON.

MANSFIELD, C. J. on this day delivered the judgment of the Court. The dollars themselves might have been obtained from the bank if they had been demanded. According to the usual course, the Defendant, who had the bill of lading, had a right to receive them; and he received the value of them, which, in effect, is the same thing. He acted as the owner of them, and disposed of them. We also think, that the Plaintiff has made out his title to 1969 of them. *Laycock* received them for him. If they had remained with *Laycock*, there would have been no doubt of the Plaintiff's right to them; and the Defendant, who received them from *Laycock*, cannot be in a better situation. Either the Plaintiff or the Defendant must be losers: but the Defendant is in the condition of all persons who take an assignment of property by the transfer of bills of lading; they are liable to be deceived by those with whom they deal. In prudence, before they take such bills, they should inquire what advices or directions have been received with them, in order to ascertain whether or not the persons who offer them have the absolute disposal of them. This is the common case of a consignment to a factor, who has a power to sell, but has no power to dispose of it otherwise. If he pawns it, although for a debt honestly due from himself, the paynee cannot hold it against the owner. *Laycock* therefore had no right to dispose of these dollars as he has done. Another question has arisen from the intermixture of property. It appears that no separation was ever made from the whole quantity of 1969 dollars belonging to the Plaintiff; and an objection has been taken on that ground against the form of the action. But we think there is no difficulty in

1811. in that point. The Defendant has disposed of all the dollars: consequently, he has disposed of those which belong to the Plaintiff; and as all are of the same value, it cannot be a question, what particular dollars were his. It is not like the case of tenants in common, who have a right to a part of every grain of corn, &c. Here, one has a right to a certain number, and the other to the rest. If a man keeps all, and has no right to a part, the action lies for that part, which he wrongfully detains.

Rule discharged.

(IN THE EXCHEQUER-CHAMBER.)

June 21.

ANONYMOUS.

No interest given on affirmance of a judgment on a replevin-bond. **KING** moved for interest upon a judgment recovered on a replevin bond, which had been given on a distress made for recovery of the arrears of a rent-charge, the assignee of the replevin bond had recovered the amount of the rent due.

The Court held that interest was not to be given for rent, and

Refused the application.

June 22.

ROBERTSON *v.* KENSINGTON and Others.

If the payee of a bill annexes a condition to his indorsement before acceptance, the drawee, who afterwards accepts it, is bound by that condition, and if the condition is not performed, the property in the bill reverts to the payee, and he may recover the contents against the acceptor.

THIS was an action of *assumpsit*, and the first count in the declaration was on a bill of exchange, of which the following is a copy, viz.

“ *Edin-*

"*Edinburgh*, 18th Nov. 1808. £180. sterling. At 45 days after date, pay this first of exchange, to the order of Mr. *Robert Robertson*, £180. sterling, value received, which place to account, as advised, *W. Forbes. J. Hunter and Co.*" "To Messrs. *Kensington, Styan, and Adams*, bankers, *London*." "Accepted, *Kensington and Co.* Entered, *P. J. Raeburn*. Indorsed, *Edinburgh*, 19 Nov. 1808. Pay the within sum to Messrs. *Clerk and Ross*, or order, upon my name appearing in the *Gazette*, as ensign in any regiment of the line, between the 1st and 64th, if within two months from this date. *R. Robertson. Clerk and Ross. J. Tindale. Thomas Eyre and Sons. Thomas Nelson. Dudding and Nelson. Bank of England.*" The Plaintiff declared as payee, against the Defendants as acceptors. The declaration also contained counts for money had and received by the Defendants to the use of the Plaintiff, for money paid by the Plaintiff to the use of the Defendants, on an account stated, and for interest.

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The plea was, the general issue. At the trial of this cause before *Mansfield C. J.* and a special jury, at the sittings after *Hilary* term 1811, at *Guildhall*, a verdict was entered by consent for the Plaintiff for the sum of 180*l.*, subject to the opinion of the Court on the following case. The bill, which was for 180*l.*, was drawn at *Edinburgh* on the 18th November 1808, by *Sir Wm. Forbes, J. Hunter and Co.*, upon the Defendants, who are bankers in *London*, payable to the order of the Plaintiff, at 45 days date, for value received. The indorsements by the Plaintiff, and by *Clerk and Ross*, as above set forth, were made before the bill was presented to the Defendants for acceptance. The bill was delivered to *Clerk and Ross*, army agents in *Edinburgh*, being persons then employed

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ployed by the Plaintiff to procure for him by purchase the commission of ensign above referred to. The bill, with those indorsements upon it, was afterwards presented to the Defendants for acceptance, and accepted by them in the usual course of their business as bankers. It was afterwards indorsed and negotiated by the other persons whose names appear as indorsers, and finally with the *Bank of England*, who discounted it. At the expiration of the 45 days specified in the bill as originally drawn, and the days of grace, the Defendants paid the contents to the *Bank of England*, who presented it to them for payment. The Plaintiff, at the time of drawing the bill, paid the full value for the same to Sir *Wm. Forbes, J. Hunter* and Co., the drawers, but did not ask, or obtain, their consent, or that of the Defendants, the acceptors, to make any alteration in the tenor of the bill by indorsement, either as to the condition of the payment, or the extension of time. The Plaintiff's name had never appeared in the *Gazette* as ensign in any regiment of the line. The question for the opinion of the Court was, whether the Plaintiff was entitled to recover: if he was, the verdict was to stand; if he was not entitled to recover, a verdict was to be entered for the Defendants.

This case was argued by *Lens Serjt.* for the Plaintiff, who contended, that it was competent for the Plaintiff by this special indorsement to make only a conditional transfer of the absolute interest in the bill, which he had purchased for a full consideration, and had vested in him by the delivery of the drawer. The Defendants, by subsequently accepting the bill, had become parties to that conditional transfer, and as the condition had never been performed, the transfer was defeated, and they became liable, after the expiration of the two months,

months, to pay the Plaintiff, to whom the property then reverted, the contents of the bill, of which none of the indorsers could enforce payment against the Defendants at the 45 days end, because they had all received the bill subject to the condition, and were bound thereby. He cited *Ancher v. Bank of England*, 'Doug. 638.

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KENNINGTON.

Shepherd Serjt. for the Defendant, contended that it was immaterial whether the acceptance was before or after the conditional indorsement. The acceptance admitted the hand-writing of the drawer, but it did not mix itself with the conduct of the indorsers: it admitted nothing which was on the back of the bill. The whole practice of the courts was accordingly; for in an action against the acceptor, it became unnecessary to prove the hand-writing of the drawer, but it was necessary to prove the hand-writing of the indorser.

The Court gave judgment for the Plaintiff.

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June 22.

MURE v. KAYE and Another.

A plea justifying an arrest by a private person, on suspicion of felony, must shew the circumstances from which the Court may judge, whether the suspicion were reasonable.

Action of false imprisonment. the Defendants pleaded that before the time when, &c. certain persons unknown had

forged receipts on certain forged dividend warrants, and received the money purporting to be due in respect thereof in bank notes of the Bank of *England*, amongst which was a note for 100*l.*, which was afterwards exchanged there for other notes, and amongst them one for 10*l.*, the date and number of which was afterwards altered; that afterwards, and a little before the time when, &c. Plaintiff was *suspiciously* possessed of the altered note, and did, in a *suspicious manner*, dispose of the same to one *A. B.*, and after, and before the time when, &c. in a *suspicious manner* departed and left *England* and went to *Scotland*, and there continued; whereupon Defendants had reasonable cause to suspect, and did suspect, that Plaintiff had forged the said receipts, whereupon Defendants gently laid their hands on Plaintiff, and carried to and detained in a gaol in *Scotland*, in order that he might be conveyed, by a warrant to be issued by a justice of the county of *Middlesex*, to be dealt with according to law: Held that this plea was too general on demurrer; for it is necessary to shew in pleading the causes of suspicion in certainty, in order that the Court may judge of their reasonableness, and using the term suspicion will not aid what is necessary to be averred.

Whether a Defendant justifying an arrest in *Scotland*, as made on suspicion of a felony committed here, must shew that the law of *Scotland*, as well as the law of *England*, warranted such arrest, *Quære*.

Or, whether the Defendant shewing by his plea an arrest made in *Scotland*, which if made in *England* would be warranted, it does not lie on the Plaintiff suing in *England* to reply that by the law of *Scotland* the arrest was not warranted, *Quære*. *Acc. per Chamber J.*

If a person having committed a felony in a foreign country comes into *England*, he may be arrested here and conveyed and given up to the magistrates of the country against the laws of which the offence was committed. *Per Heath J.*

405*l.*, feloniously at the foot of the said forged and counterfeit warrant did falsely make, forge, and counterfeit a certain receipt for the said sum of money pretended to be payable on the said forged and counterfeit dividend warrant, to wit, for the sum of 405*l.*, the tenor of which said false, forged, and counterfeit receipt here follows, that is to say, " I do hereby acknowledge to have received of the *Bank of England* the above-mentioned sum, in full payment for half a year's annuity, due as above-said. Witness my hand this 6th day of *January* 1807.

Witness *G. Taylor.*

W. Birt, attorney."

With intent to defraud the Governor and Company of the *Bank of England*, against the form of the statute in that case made and provided. The same allegation was made in respect of three other counterfeit dividend warrants; and the plea then proceeded to state, that afterwards some person or persons then and still unknown did in a suspicious manner demand and receive of the Governor and Company, in bank notes of the said Governor and Company, for and in respect of the several false, forged, and counterfeit receipts, the several sums of money for which they were pretended to be receipts, amounting to 2430*l.*, among which said bank notes was a certain one for the sum of 100*l.*, which said bank note, very shortly afterwards, to wit, on the 12th *July*, was by some person or persons then and still unknown, suspiciously exchanged with the Governor and Company for other bank notes of smaller value, among which was a certain one for the sum of 10*l.*, bearing date in two several parts thereof, 7 *July* 1809, and numbered in two several parts, 5061, which said dates and numbers were afterwards falsely and fraudulently altered to 17 *July* 1809, and 5961. The Defendants then averred, that afterwards, and a little before the time when, &c. the Plaintiff was suspiciously possessed of the said bank note so altered, and did, in a suspicious manner, dispose of and

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put away the same to one *A. B.*, and afterwards, and before the time when, &c., in a suspicious manner departed from and left *England*, and went to *Scotland*, and there continued until the time when, &c. Of all which premises the Defendants had notice. Whereupon they had reasonable and probable cause to suspect, and did suspect, that the Plaintiff had feloniously forged the said receipts; wherefore they gently laid their hands upon him, and carried him to and detained him in a certain common gaol in *Scotland*, for the space of four days, in order that he might be conveyed by a warrant to be issued by one of his majesty's justices for the county of *Middlesex*, to be dealt with according to law, the said time being a reasonable time for that purpose. The four following pleas differed in no material respect from the preceding, but only varied the circumstances and causes of suspicion against the Plaintiff therein alleged. The next plea stated, that before the said time when, &c. some person or persons, then, and still unknown, feloniously did forge, and counterfeit a certain bank note, (setting forth the bank note for the payment of 10*l.* stated in the first special plea) with intent to defraud the Governor and Company of the *Bank of England*, and that afterwards, and a little before the said time when, &c., the Plaintiff was suspiciously possessed of the said forged and counterfeit bank note, and did then and there, in a suspicious manner, dispose of and put away the same to one *A. B.*, and afterwards, and before the said time when, &c. the Plaintiff in a suspicious manner departed from, and left *England*, and went to *Scotland*, and there continued until the said time when, &c., of which the Defendants had notice; whereupon they had reasonable and probable cause to suspect, and did suspect, that the Plaintiff had feloniously, and with intent to defraud the said Governor and Company, forged and counterfeited the said bank note. The next plea stated, that before the

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the said time when, &c. some person or persons, then, and still unknown, feloniously did forge and counterfeit a certain bank note (setting it out as before) &c., and that afterwards and a little before the time when, &c. the Plaintiff was suspiciously possessed of the said forged note, and afterwards and before the said time, &c., in a suspicious manner departed from and left *England*, and went to *Scotland*, &c., of which the Defendant had notice; whereupon they had reasonable and probable cause to suspect, &c. (as before.) The last plea alleged, that before the time when, &c. some person or persons, then and still unknown, feloniously did forge, &c. (setting out the note as before), whereof the Defendants had notice, and had reasonable probable cause to suspect, &c. The pleas then justified the taking and detaining the Plaintiff in the same manner as in the first plea. To these pleas there were general demurrers and joinders therein.

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Best Serjt. in support of the demurrers, insisted, first, upon the insufficiency of all the pleas, on the ground that they alleged the arrest of the Plaintiff to have taken place in *Scotland*, which arrest he contended the law of that country did not warrant. [*Heath* J. referred to the case in *Str.* 848. *Rex v. Kimberley*, where a criminal was apprehended in *England* for a capital felony created under an *Irish* act of parliament in stealing an heiress, and upon such apprehension was carried over to *Ireland*, tried, and executed for that offence. He asked, whether the prisoner in that case, if he had been acquitted, could have maintained an action against those who apprehended him, supposing he were taken on probable grounds of suspicion.] There a positive felony was charged and proved against the prisoner: here a suspicion only is alleged, and the law of *Scotland*, as it seems, does not authorize a person to apprehend another upon suspicion

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of his having committed a felony in *England* without warrant; for if it did, the stat. 13 G. 3. c. 31. which provides for the apprehension of persons against whom warrants are issued in *England*, and who escape into *Scotland*, by enabling the justices there to indorse such warrants, would have been unnecessary. [*Mansfield C. J.* By the same mode of argument it might be contended, that an arrest without warrant in *England* upon suspicion of felony is not lawful, because the party suspecting may obtain a warrant by resorting to a magistrate. *Lawrence J.* As well might it be argued, that because the 24 G. 2. c. 55. requires the justices of one county to indorse a warrant issued by the justices of another county, in order that the person against whom the warrant issued may be apprehended in the county where he is found, therefore such person cannot be arrested upon suspicion in either county.] 2dly, Admitting that an arrest in *Scotland* upon suspicion of a felony committed in *England* is warranted by the law of *Scotland*, still the Defendants ought to have pleaded that law, in order to justify under it; and having omitted to do so, they must stand upon the law of *England*, which does not authorize such an arrest. It may be admitted indeed, that, by the law of *England*, if a felony be committed here, a private person, upon reasonable cause of suspicion, may arrest the person suspected of having committed it; but he cannot follow that person into a foreign country, and there apprehend him. [*Mansfield C. J.* intimated that the power of arrest in such case extended over every part of the king's dominions.] 3dly, Even if this arrest had taken place in *England*, it would be bad under the circumstances disclosed in the pleas, which do not amount to a reasonable ground of suspicion: for it is not enough that they contain a general allegation that the Defendants had probable cause to suspect, but they should also shew in certainty the cause of suspicion; in order that the

Court may judge, whether such suspicion be just. 2 Inst. 52.; and in *Hawk. P. C. lib. 2. c. 12. f. 12.* it is said that there must be such circumstances as induce a strong presumption of guilt, as coming out of a house wherein murder has been committed, with a bloody knife in one's hand, or being found in possession of any part of goods stolen, without being able to give a probable account of coming honestly by them: but the mere possession of a forged note, and the disposing of it by the Plaintiff, and his afterwards going into *Scotland*, are not such strong presumptions of his guilt, without implicating him in some way with a probable knowledge of its being forged, as to justify the Defendants in apprehending him on their own authority; and if so, the allegation that the Plaintiff was *suspiciously* possessed, and did, *in a suspicious manner*, dispose of the note, will not help the Defendants for the reasons above assigned. As to the two last pleas, they are clearly bad, the one resting upon the mere circumstance of the Plaintiff's possession and his going to *Scotland*, and the other upon the general allegation alone that the Defendants had cause to suspect, &c.

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Shepherd Serjt. contrà. 'It is unnecessary to go into the question touching the law of *Scotland*, for it is enough to say, that the Plaintiff is not in a condition to avail himself of that law, supposing it to be, as he contends, in his favour; in order to do which, he should have shewn to the Court what that law is, and how the arrest complained of was contrary to it, otherwise it must be taken to be governed by the law of that country to which he appeals. It may be, indeed, that the arrest, though warranted by the law of *England*, is not so by that law of *Scotland*; but then it is for the Plaintiff, who relies upon the exception, to make out that exception; and this is an answer to the objection that

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the Defendants ought to have pleaded the law of *Scotland*, inasmuch as they do not defend themselves under it, although they allege the arrest to have taken place in *Scotland*, but stand upon the law of *England*, which they may do, until it be shewn that the law of the country where the arrest happened is contrary. In *Melan v. The Duke de Fitzjames*, 1 Bos. & Pull. 138., where the Defendant was held to bail on an instrument made in *France*, by which his property only, and not his person was, according to the laws of *France*, rendered liable, the Court thought him entitled to his discharge, upon his shewing what the law of *France* was in this respect: but they did not require the party who held the Defendant to bail according to the rules and practice of the law of *England*, to shew it was also in conformity with the law of *France*, though the instrument appeared by the affidavit to hold to bail to have been made in *France*. So here the Defendants justify an arrest of the Plaintiff in *Scotland*, which being according to the law of *England*, the Court will not require them to shew it to be also in conformity with the law of *Scotland*, but will presume it to be so, unless the contrary be shewn by the party who would avail himself of that law. [Lawrence J. expressed a doubt whether it was not incumbent on the Defendants, who alleged the arrest to have been made in *Scotland*, to have shewn by their plea that the law of *Scotland* authorized them to make it; for without an allegation to that effect, the Court could not take notice of that law, neither could they presume that the law of the two countries was the same.] By appealing to the law of this country, the Plaintiff must be taken to complain of an injury suffered in violation of it, and therefore in answer to such complaint it is enough for the Defendants to bring themselves within the law. [Lawrence J. A party may sue here for an injury done to him

him in a foreign country, as being against the law of that country; for the damage being personal, it follows the person hither, and he may sue with reference to that law alone. In *Mossyn v. Fabrigas*, Cowp. 174, 5., Lord Mansfield C. J. so held, and said, that the Defendant in that case might have defended himself by the laws of the foreign country, for whatever is a justification in the place where the act is done, ought to be so where the cause is tried.] With respect to the last objection, that the pleas do not disclose a probable cause of suspicion, which words, *ex vi termini*, import something less than an actual proof of guilt, it is for the Court to determine whether the circumstances alleged in those pleas, when combined together, do not amount to a sufficient cause to justify the arrest of the Plaintiff. The argument of the Plaintiff is, that each circumstance, taken separately, would not be sufficient, which may be admitted without prejudice to the Defendants, though the possession of the forged note is of itself a pretty strong circumstance, and might alone, according to the usual practice of the Bank of *England*, have given occasion to the detention of the person presenting it there for payment. That circumstance, therefore, coupled with the prior transactions, and with the Plaintiff's subsequent departure from *England*, form a strong case of suspicion; and if the Court shall hold this mode of justifying insufficient, it will give occasion in future to much inconvenient length of pleading in cases of this description, for nothing less than a detail of every circumstance relating to the transaction will then be sufficient,

Best in reply was stopped by the Court.

MANSFIELD C. J. As the Court are unanimous upon one point of this case, it is unnecessary to go into the

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the others, and therefore I shall give no opinion upon the questions that have been made in argument, viz. 1st, whether if the Plaintiff complains of an injury done to him in *Scotland* by means of an arrest which would be lawful in this country, he must not state specially in his declaration what is the law of *Scotland*, in order to shew the act complained of to be contrary to that law. That point does not properly arise in this case, nor is it material to consider, 2dly, if, as in this case, the Plaintiff declare generally, and the Defendants plead thereto that they arrested him in *Scotland*, whether they must not also proceed further to shew that they were authorized so to do by the law of *Scotland*; for upon the other point, there can be no doubt that this arrest, with reference to the law of *England*, under which the Defendants have justified, is not well pleaded, but that the pleas are in this respect insufficient. The substance of them is this, that a forgery is committed by certain persons unknown, by means of which, (*inter alia*, a bank note for 100*l.* is obtained at the Bank of *England*, which is afterwards exchanged there for (*inter alia*) one of 10*l.*, the date and number of which is altered to prevent its being traced. The pleas then state, that the Plaintiff was possessed of this altered note, that he disposed of it to *A. B.*, and left *England*, and went into *Scotland*. These are the acts stated to have been done by the Plaintiff, in order to implicate him in a suspicion of being connected with the forgery: and for that purpose, as each of these acts is alleged, the word suspiciously is added to the allegation. But what circumstances of suspicion are stated as accompanying either of them? 1st, As to the Plaintiff's being possessed of the note, it is not shewn in what manner, nor how soon after the bank parted with the note, nor at what distance of time after the alteration, he became possessed of it. Next, as to his disposal of it: there are no circumstances disclosed in

in the pleas to take it out of the ordinary course of payment, neither is there one fact of suspicion stated as attending his journey into *Scotland*, which might not equally attend the journey of any other man, who might go thither from motives, either of pleasure, or business; and it must not be understood that using the word suspiciously will compensate these omissions, or make it less necessary to state such circumstances, as may enable the Court to judge whether they give rise to a well-grounded suspicion or not. If it had appeared that the Plaintiff had improperly come by the note, or, upon application made to him, had given a false or unsatisfactory account of it, had paid it out of the ordinary course of trade, or had left this country in a strange and unusual manner, as by absconding from his home and business, there might have been good grounds for the Court to have given effect to the Defendant's suspicion; but there are none such stated in these pleas, and of the few circumstances which are stated, there are none, as it seems to me, to raise such a suspicion as warranted the Defendants in arresting the Plaintiff. I think, therefore, that judgment must be given for the Plaintiff.

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HEATH J. As to the first point, it has generally been understood, that wheresoever a crime has been committed, the criminal is punishable according to the *lex loci* of the country against the law of which the crime was committed, and by the comity of nations the country in which the criminal has been found, has aided the police of the country against which the crime was committed in bringing the criminal to punishment. In Lord *Loughborough's* time the crew of a *Dutch* ship mastered the vessel, and ran away with her, and brought her into *Deal*, and it was a question whether we could seize them and send them to *Holland*; and it was held we might.

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And the same has always been the law of all civilized countries. As to the last point, I concur with my Lord in the opinion that these pleas cannot be supported for the reasons by him stated. It is necessary, in order to make good a justification of this description, for the Defendants to shew, by pleading, that they had reasonable cause of suspicion, upon which they acted : but these pleas (as it has been shewn) are in this respect wholly insufficient.

LAWRENCE J. I agree also with my Brothers on the last point, and cannot help again expressing my doubts whether the Defendants, who justify a taking in *Scotland*, should not also have pleaded the law of *Scotland* to make that justification complete ; but I wish not to be considered as giving any opinion how it is to be pleaded in future.

CHAMBER J. I am inclined to think it is no objection to the defence, that the arrest appears to have taken place in *Scotland*, and that the inference is not well founded, that we therefore cannot judge of its validity without taking notice of the law of *Scotland*, which I agree we have no means afforded us of doing : on the contrary, I think that the Court unnecessarily go out of their way to notice the law of *Scotland*, when they presume, without either allegation or evidence, that the principles of arrest which would bear out the Defendants in this country, would not bear them out in making the arrest there ; but as it is unnecessary, I mean to give no opinion on the point. Upon the main point, I will only add, that if it had appeared in these pleas, as in the case cited of stolen goods it usually does, that the note had been found in the Plaintiff's hands recently after the transaction, it might have varied the case ; but so far from that appearing to be so, it is not inconsistent

sistent with this mode of pleading, that both that circumstance and the Plaintiff's journey into *Scotland* might have happened a considerable time after, nor is it shewn that he departed hastily, leaving his business here unfinished, nor are any other circumstances shewn that indicate a reasonable ground of suspicion.

Judgment for the Plaintiff.

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BAKER v. HOLTPZAFFELL.

June 25.

ACTION for the use and occupation of certain premises in *Long-Acre*. At the trial before *Mansfield* C. J., at the *Westminster* sittings, in this term, a verdict was found for the Plaintiff for three quarters of a year's arrears of rent. It appeared that very shortly after the accrual of the first quarter's rent the premises had been consumed by fire, and since that time had been in a ruinous state and not inhabited by the Defendant. An agreement, not by deed, was given in evidence, by which the Defendant agreed to pay the rent during the demise of the term specified in the agreement.

The landlord of premises demised under a written agreement, may recover against his tenant in an action for use and occupation, the rent accruing after the premises are burnt down, and no longer inhabited by the tenant.

Shepherd Serjt. moved to set aside the verdict, except as to the first quarter's rent, on the ground that the action for use and occupation does not lie for premises which no longer exist, and therefore cannot be said to be occupied; but in such case the landlord must resort to his agreement, in order to entitle himself to the rent. He contended that as the stat. 11 G. 2. c. 19. §. 14. which gave this form of action for use and occupation, enables the landlord to recover a satisfaction for such premises as are held or occupied by the Defendant, it must be implied from thence that it was not meant

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to be extended to premises, which, so far from being held or occupied by the Defendant, were not even capable of occupation.

MANSFIELD C. J. The land was still in existence, and there was no offer on the part of the Defendant to deliver it up. The landlord could not enter to rebuild, the tenant might have rebuilt the premises if he had so pleased, and occupied them at any time within the term, he therefore must be taken still to hold the land, which is sufficient to satisfy the words of the statute.

HEATH J. This point has frequently been decided *an nifi prius*, though I do not recollect any case reported. The Defendant might have rebuilt at any period of the term, whereas the landlord would have been a trespasser if he had entered for that purpose, which shews that the former held the land.

Per Curiam,

Rule refused.

June 26.

JONES v. BREWER.

The Court will not, upon motion, give leave to examine an attesting witness to a deed upon interrogatories, and to give such examination in evidence at the trial, on the ground that he

is incapable, through illness, of attending in person, and that he is not likely to recover, so as to be able to attend, notwithstanding it also appears, by the affidavit, that the Defendant had at one time admitted the execution of the deed; nor will the Court, on these grounds, grant a rule for dispensing with the attendance of such witness at the trial.

ON a former day in this term *Lens Serjt.* obtained a rule *nifi* on behalf of the Plaintiff, for leave to examine the subscribing witness to the bond on which this action was brought, upon interrogatories, and to give such examination in evidence at the trial, upon the ground, as appeared by the affidavit on which he moved, of his being incapable, through illness, of at-

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tending in person, and of its being improbable that he would ever recover so as to be capable of attending. The affidavit also stated that the Defendant, upon one occasion, had admitted his execution of the bond, but afterwards upon hearing of the illness of the witness, had retracted that admission, and declared he would neither make nor receive admissions. At the time when the rule was moved, *Mansfield C. J.*, doubted whether it were not unnecessary, inasmuch as under the circumstances disclosed, evidence of the handwriting of the witness would be admissible at the trial, but upon the suggestion of *Lawrence J.*, that the admissibility of such evidence had been objected to at *nisi prius*, the rule was granted.

Best, Serjt. was now about to shew cause, but was stopped by

MANSFIELD C. J., who said he was afraid that the Court had no power to make the rule absolute. if a subscribing witness is incapable of attending from inevitable cause, such as death, or absence from the country, or even perhaps in some instances of sickness, his handwriting may be proved, but it is not necessary for the Court upon motion to try what degree of necessity will dispense with his presence, which question, when it arises at *nisi prius*, will come more regularly before the Court.

HEATH J. The practice now attempted would be very dangerous, for the presence of an attesting witness is in many cases of the utmost importance, and ought not to be dispensed with upon such grounds. If this were permitted to be done, it might lead witnesses to feign sickness in order to keep out of the way.

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Lens Serjt. admitted that in the case of a bond it had been held, that the acknowledgment of the obligor would not dispense with the proof of its execution by the production of the attesting witness, but he submitted to the Court, whether, coupling this admission with the other circumstances of the case, he might not be permitted to change the form of his rule into a motion for dispensing with the attendance of the attesting witness.

MANSFIELD C. J. We cannot permit that, for the Defendant's admission is a fact which we cannot try upon affidavits, because if it were admissible evidence, it would decide the cause, and ought therefore to be submitted to the consideration of a jury.

Per Curiam,

Rule discharged.

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EVANS v. MUNKLEY and Another.

In trespass if the Defendant justify Plaintiff in a suit in an inferior court, under mesne process of that court, he must allege in his plea that the cause of action arose within the jurisdiction, otherwise the Plaintiff may demur.

TRESPASS for seizing and detaining the Plaintiff's horses until he paid a sum of money to redeem them. The Defendants justified (in separate pleas), under mesne process out of the court of the city of *Hereford*, (and shewed that the Court had jurisdiction of all manner of pleas, actions, suits, and demands whatsoever, trespasses with force and arms or otherwise, in contempt of the king, and of whatsoever trespasses, faults, and offences within the said city and the suburbs, and liberties, limits, and precincts of the same, done, moving, arising, had, or committed,) the Defendant *Owen*, as an officer of the court, on a plaint levied by the Defendant *Munkley* against the Plaintiff of a plea of trespass on the case for a cause of action personal, to the damage of the Defendant

fendant of 42*l.* 8*s.*, (without stating that the cause of action arose within the jurisdiction of the court). To the plea of the Defendant *Owen*, the Plaintiff replied, *de injuriâ sua propriâ*, &c., and to that of the Defendant *Munkley*, he demurred specially, assigning for cause (*inter alia*) that it did not appear by the plea, that the plaint of a plea of trespass on the case therein mentioned, was levied against the Plaintiff for a cause of action arising or happening within the city of *Hereford*, or the suburbs, limits, or precincts thereof.

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Runnington Serjt. in support of the demurrer, relied upon the rule laid down in *Peacock v. Bell*, 1 *Saund.* 74., respecting jurisdiction, and recognized in *Stanian v. Davies*, 1 *Ld. Ray.* 796., and *Winsford v. Powell*, *ibid.* 1310., viz. that nothing shall be intended to be out of the jurisdiction of a superior court, but that which specially appears to be so; and on the contrary, nothing shall be intended to be within the jurisdiction of an inferior court, but that which so expressly alleged.

MANSEFIELD C. J. cited *Trevor v. Wall*, 1 *T. R.* 151., and said that he supposed the general rule would not be disputed, but that it would be attempted to distinguish this from the cases cited.

Runnington was stopped by the Court.

Best Serjt., contra. The question in all the cases cited arose upon error brought on the judgment in the inferior court, and it was decided that in inferior courts it is necessary that the gist of the action should appear to be within their jurisdiction. But this is an action of a different sort, which is brought for a cause collateral to the original suit in the inferior court, and to which therefore the rules applicable to proceedings in that

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court do not apply. This was so decided in *Truscott v. Carpenter*, 1 *Ld. Ray.* 229., where in an action of false imprisonment, the Defendant, after justifying (as here) under process of an inferior court, alleged that the cause of action arose within the jurisdiction, and it was held that such allegation was immaterial, and could not be traversed, and the resolution of the case of the *Marbalssea*, 10 *Co.* 76., where the contrary had been adjudged, was held to be a hard resolution, and warranted by none of the books there cited; and the distinction was taken, that if the cause of action arose out of the jurisdiction of the inferior court, the Defendant in the inferior court ought to plead it, and if he does not, the affair of the jurisdiction is over, and he shall not take advantage of it in any collateral action against the Plaintiff; the same doctrine was also held in *Gwinne v. Poole*, 2 *Lutw.* 935., 1560., and these cases are directly in point.

LAWRENCE J. The case of *Moravia v. Sloper*, *Willes* 30., has set this question at rest, and that is a later case than any of those which have been cited; and *Willes* C. J. in delivering the judgment of the Court went into all those cases very fully, and after considering them, it was decided, that where a party, who was the Plaintiff below, justified under process of an inferior court, it was necessary to set forth in his plea that the cause of action arose within the jurisdiction of the court, otherwise the Plaintiff might demur thereto.

CHAMBRE J. In *Truscott v. Carpenter* the plea did allege that the cause of action arose within the jurisdiction.

The rest of the Court concurred.

Per Curiam,

Judgment for the Plaintiff.

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HEWIT v. PALMER.

June 26.

ON a rule for setting aside the interlocutory judgment in this cause, for irregularity, it appeared that the declaration was delivered on the 15th *February*, indorsed to plead thereto within the four first days of *Easter* term. On the 18th and 24th *May* two several demands of a plea were made, after which a rule to plead was given, and on the 6th *June* judgment was signed as for want of a plea without any other demand of one.

A demand of a plea made before the rule to plead is given, will not entitle a Plaintiff to sign judgment after the rule expired, as for want of a plea.

Lens Serjt., against the rule, insisted that it was not necessary that the demand of a plea should be made after the rule given to plead, and therefore the judgment was regularly signed. He said that the case in *Barnes* 276., *Eames v. Jew*, on the authority of which the rule was granted, had been overruled in 6 *T. R.* 689., *The Churchwardens of Edmonton v. Osborne*, where it was held that the demand of a plea may be made at the time of delivering the declaration; and in *Maxwell v. Skerrett*, 5 *Easf*, 547., where the precise point now before the Court arose, it was decided that a demand of a plea being once made, a rule to plead may be given afterwards without any fresh demand of a plea.

LAWRENCE J. It strikes me that the rule laid down in *Barnes* is the most reasonable. After the Plaintiff has declared, the Defendant is not bound to plead until he is ordered so to do by the Court, in the form of a rule to plead; and what is the use of the Plaintiff making a demand of a plea, until such time as the Defendant is bound to plead? After the Defendant becomes bound by the rule to plead, the Plaintiff is to make demand of a plea, and is restrained from signing

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judgment before the expiration of twenty-four hours after that demand, which practice was introduced for the benefit of the Defendant, in order that judgment may not be signed against him by surprise. The rule to plead is not served on the Defendant, but only entered in the book of the officer, and therefore, until a demand is made, he cannot be supposed to have notice of the rule, for he is not bound to be perpetually searching the officer's book. The learned Judge (after referring to the officer,) then said, that the practice of this court was uniform, that the demand of a plea must be made after the rule given to plead.

The Court made the

Rule Absolute.

Shepherd Serjt. supported the rule.

June 29.

JESSON v. SOLLY.

If a consignee accept goods under a bill of lading, at the bottom of which is a memorandum that the ship is to be cleared in 16 days, and 8*l.* per day, demurrage to be paid after that time, the master, upon delivery of the goods, may recover demurrage against the consignee.

THIS was an action brought by the master of a vessel upon a general count in *assumpsit* for demurrage. Upon the trial, before *Mansfield* C. J. at the sittings after *Hilary* term 1811, it appeared, that the Plaintiff, who was master of a vessel, had taken on board a cargo, and signed bills of lading, deliverable to the order of the shipper, upon payment of freight, and at the bottom was a memorandum that the ship was to be delivered in 16 lay days, 8*l.* per day demurrage to be paid for every laying day after the expiration of that time. The master retained one part of the bill of lading, which was produced as his evidence at the trial, and it was objected, that, as it was not signed by the confignor or consignee, it was not admissible in evidence; it was however received

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ceived as a counterpart, upon the ground that the Defendant might, by producing the part which he possessed, prove it dissimilar, if it were so, to the part now produced. When the vessel arrived, no bill of lading had arrived in this country; the Defendant, who expected the cargo to be consigned to him, demanded the goods, which the Plaintiff, having been apprised by another person that he also claimed the consignment, refused to deliver, unless either upon sight of the bill of lading, when it should arrive, indorsed to the Defendant, or on receiving an indemnity: he also gave the Defendant notice, that if the vessel was not delivered within the 16 lay days, he should insist on the demurrage. The bills of lading being delayed, the vessel was not completely delivered till eight days after the expiration of the sixteen. The Defendant paid the freight, but refused to pay the demurrage. He now objected, that he having demanded the goods, and offered to accept them, the vessel's delay was caused by the Plaintiff's own fault, and therefore he was not entitled to recover, and *Mansfield C. J.* being struck with the objection, nonsuited the Plaintiff, with liberty to move to enter a verdict for the Plaintiff for eight days demurrage.

Shepherd Serjt. had in *Easter* term obtained a rule nisi to set aside the nonsuit and enter a verdict for 64*l.* for the Plaintiff.

Lens Serjt. in this term shewed cause. He contended that although the captain was not compellable to deliver the goods before he saw the bill of lading, yet, as his refusal to deliver them when the Plaintiffs were willing to accept them, was only for his own security and accommodation, the delay was the result of his own choice, and he could not charge the Defendant with the consequences. At all events he must resort to the consignor

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for demurrage, and could not recover it against the consignees.

Shepherd and *Best* Serjts. in support of the rule, urged that the Defendant, having ultimately received the bill of lading, containing the condition for payment of demurrage, and having claimed and received the goods under it, subsequently to the Plaintiff's refusal to deliver, could not now contest that contract. The Plaintiff had notice of conflicting claims, and had no notice, until the arrival of the bill of lading, with whom the shipper's order was to be found. He even deserted his duty, in offering to deliver the goods upon an indemnity. It was part of the contract, to pay him demurrage for the ship, until he could safely and legally, and with a sufficient discharge to himself, deliver the cargo. In the mode in which the state of *Europe* requires commerce now to be conducted, the master of a neutral may perhaps never see his consignors again; it is therefore a necessary practice which prevails, that he should stipulate for payment by the consignees of demurrage as well as freight, and that the consignor should transmit the bills of lading by another vessel.

MANSFIELD C. J. This is quite a new case, arising from the new state of trade, and there is great weight in the observation made for the Plaintiff, that many of these ships coming from a foreign country, to which they may never go again, put into their bill of lading a condition, which enables them to look to the consignee for demurrage, as well as for freight. My Brothers are very clearly of opinion, that if the consignee will take the goods, he adopts the contract.

HEATH J. It is clear the Plaintiff is entitled to demurrage, either from the consignor or consignee. De-

murrage is only an extended freight, and the consignee, by adopting this bill of lading, makes himself liable to demurrage as well as to freight.

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CHAMBRE J. It would be monstrous, if the consignee, accepting the contract with knowledge of the terms, should not be bound by it, and could send the captain back to the consignor for demurrage. Therefore, the Rule must be made

Absolute.

COTTON v. WITT.

July 1.

THIS was an action on a policy of assurance which had stood for trial a great length of time, having been postponed upon repeated applications made by the Defendant on account of the absence from this country of one *Joachim Hinds*, a necessary witness in his behalf. The Defendant at length brought him over, and upon his arrival, the cause was tried, and the witness was examined, and a verdict was thereupon found for the Defendant; and upon the taxation of costs, the Defendant claimed 64*l.* for the expences of bringing the witness from *Denmark* to this country; but the prothonotary refused to allow the costs of the voyage from *Denmark*, under the authority of *Kensington v. Inglis*, and *Hagedorn v. Allnutt*, ante 3. 379.

The costs of bringing over a necessary witness from the continent to this country are to be allowed in future.

But not the costs of his return.

A rule *nisi* having been obtained by *Bess* Serjt. on a former day for reviewing the taxation, and that the prothonotary might be directed to allow the costs of the witness's whole voyage hither and his return, upon the ground that such was the practice in the Court of King's Bench, and that it was the most reasonable rule,

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Shepherd Serjt. shewed cause, and contended that the practice of this court had been to allow the costs only from the time the witness came within reach of the subpoena, relying as before on *Kennington v. Inglis*.

Best Serjt. in support of the rule, contended, that that decision was founded on a mistake of the Court, in supposing that it was the practice of *B. R.* to disallow such costs, whereas it turns out upon inquiry to be their constant practice to allow them, and it is right that the practice in both courts should correspond in cases which are similar.

MANSFIELD C. J. I think this case as proper to begin the practice as any. The Defendant had paid into court as much as the other underwriters upon the policy, and their payments had been accepted by the Plaintiff; but in this case he would neither accept the payment which had been offered him, nor take the money out of court, nor consent to the examination of the witness on interrogatories.

CHAMBRE J. This is not a variation from a former mode of practice (*a*); and the establishment of the rule is essential to justice, which applies equally to the allowance of costs in a court of law, as it does to any other matter where right or title is in question.

The Court made so much of the rule absolute as applied to the prothonotary's allowing the costs of the witness's voyage from *Denmark*, but not of his return.

(*a*) See the old practice mentioned in *Hagedorn v. Allnutt*, *ante*, 3. 380.

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READSHAW v. BALDERS.

July 1.

THE Plaintiff declared in covenant for the arrears of a certain annuity of 150*l.* granted to him by one *Augustus Beevor* and the Defendant, for their joint lives, and the life of the survivor, by indenture bearing date 26 Sept. 1805. *Habendum*, during their joint lives and the life of the survivor to be paid and payable by equal quarterly payments (setting out the days of payment) *without any deduction or abatement whatsoever out of the same or any part thereof for or in respect of the then present or any then future tax upon property, or the profits thereof, or any other taxes, charges, rates, assessments, or other impositions whatsoever, then already taxed, charged, rated, assessed, or imposed, or thereafter to be taxed, charged, rated, assessed, or imposed upon the rectories, vicarage, and premises, or upon the manor, messuages, farms, lands, tenements, advowsons, and hereditaments thereby charged with the payment of the annuity, or on the said annuity, or on the said A. B. and the Defendant in respect thereof, by authority of parliament, or otherwise howsoever.* The declaration then set out a covenant by the grantors *to pay the annuity on the days and times, &c. without any deduction or abatement whatsoever out of the same, or any part thereof, for or in respect of the then present or any then future tax upon property, or the profits thereof, or any other taxes, charges, rates, assessments, or other impositions whatsoever; and averred, that on the 26th Sept. last 112*l.* 10*s.* of the said annuity, for three quarters of a year, became due. The Defendant pleaded a former judgment recovered upon the same cause of action, and the Plaintiff in his replication traversed the identity of the cause, upon which issue was joined; and at the trial thereof at the sittings in last *Easter* term, a verdict was found for the Plaintiff for the amount of the*

A covenant in an annuity deed, made prior to the stat. 46 G. 3. c. 65. §. 125, [which stat. has a retrospective operation,] whereby the grantor of the annuity covenanted to pay the same on the days and times, &c. without any deduction whatever out of the same, or any part thereof, for or in respect of the then present or any then future property-tax, is void in respect of its obligation on the grantor not to deduct the property-tax, but not in respect of the payment of the annuity, subject to such deduction.

three

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three quarters arrears after deducting the property tax. On a subsequent day in that term, *Onslow* Serjt. obtained a rule *nisi* for arresting the judgment, on the ground that the covenant for the payment of the annuity to the Plaintiff without any deduction in respect of the property tax, rendered the whole void by stat. 46 G. 3. c. 65. §. 115. which after providing, under penalties, for the allowance of the deduction authorized to be made by that act, further enacts, that all contracts, covenants, and agreements, made or entered into, or to be made or entered into, for payment of any interest, rent, or other annual payment aforesaid, in full, without allowing such deduction as aforesaid, shall be utterly void.

Best Serjt. now shewed cause; and observed that upon the face of this declaration the indenture appeared to bear date in *Sept.* 1805, and that the statute relied upon in support of the objection did not pass until 1806; he contended therefore that it would be a strained construction of that act, to hold that it had relation back to an antecedent period so as to make void that contract which was originally well framed and obligatory between the parties; and that the true construction, by which the object of the act would be fully attained, was this, that the covenant in question did not vacate the whole contract, but only so much of it was void, as was contrary to the particular enactment. If a different construction were to prevail, great injustice would follow; for then a landlord, who before the passing of the act had demised premises to a tenant for a long term of years at a rent clear of all deductions on account of property tax, upon the faith of which demise the tenant had expended large sums of money upon improvements, might avail himself of an *ex post facto* law to dispossess the tenant of his improved term. The whole deed therefore is not rendered void, but only the covenant, *pro tanto*; and accordingly, in *Gaskell v. King*, 11 *East*, 165., which was a stronger case

case in favour of the objection, because, there the indenture was made subsequent to the act, it was held, that a covenant by the lessee for payment of the property tax, though void by the statute, did not avoid a covenant for payment of the rent, which was entirely distinct. So here, the covenant for payment of the annuity is distinct and substantive, and although it is included in the same clause, is not so interwoven with the subsequent stipulation respecting the property tax, as to make the one incapable of taking effect without the other. It is not made a condition upon which the payment of the annuity is to depend, that such payment should be clear of any deduction in respect of property tax, and if a subsequent statute has interposed to make void one part of the clause, it is clear that it may be rejected, and the remainder permitted to take effect.

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Onflow Serjt. contra, relied upon the express words of the statute, which he said were retrospective as well as prospective, and denied that the construction attempted on behalf of the Plaintiff would attain the object of the act, which directed the landlord or annuitant to be charged with the payment of the tax, in order to prevent any diminution on account of such tax in the rent or annuity to be agreed upon between the parties, which would be the necessary consequence of making it a charge upon the tenant or grantor of the annuity, and by that means the revenue would suffer diminution. The policy of the law therefore, as well as the express words of it, rendered the whole agreement, and not such parts only of the agreement as were contrary to it, utterly void. But supposing, as it has been admitted, that the statute affects only that part of the covenant which respects the payment of the property tax, it is impossible in this case to give effect to the remainder for payment of the annuity, because both parts are so blended together as to form one entire

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entire covenant, which cannot be separated without doing violence to the whole: and therefore the case of *Gaskell v. King*, which was expressly decided upon this distinction, viz. that a covenant void by this statute will not avoid other independent covenants which are good, does not apply; or if it does, it serves only to shew that if that case had been like this, the decision would have been the other way. The same distinction was taken and acted upon in a later case of *Wigg v. Shuttleworth*, 13 *East*, 87. In *Croftley v. Arkwright*, 2 *T. R.* 603., and *Denn v. Dollman*, 5 *T. R.* 641., it was held, that the want of a memorial of an annuity deed registered according to the directions of 17 *G. 3. c. 26.* avoided the whole deed, though there were parts of it not connected with the annuity, for the words of the statute made such deeds null and void to all intents and purposes. But the words of this statute are equally strong, and therefore demand a similar construction, especially in a case which affects the revenue.

Best replied on the cases, that *Wigg v. Shuttleworth* arose on an indenture made 20th *Aug.* 1808, two years after passing this act: that the stat. 17 *G. 3. c. 26.* in terms avoids the deed, bond, instrument, and assurance, which contains any grant not conformable to the act, whereas this act only avoids the contract, covenant, or agreement made for payment in full without deduction of property tax.

MANSFIELD C. J. This is certainly a most extraordinary objection that is made to the validity of a covenant for the payment of an annuity, which covenant is contained in an instrument executed before the passing of the statute on which the objection is founded. It is said nevertheless that the statute was passed with a retrospective object, so as to annul covenants before then made

made, not only for the payment of the property tax, but also for the payment of rent or of an annuity, if coupled together in the same deed. But viewing the statute in its retrospective light, I think the legislature must be intended to have thereby meant only to secure to the lessee or grantor of the annuity, who was to be charged in the first instance with the payment of the property tax, an allowance in respect of such payment from the persons who were to be ultimately charged therewith. For this purpose, in order to do away any pretence on the part of those persons for refusing such allowance, the statute embraces all contracts, as well those made before, as those made subsequent to the time of its passing, for the payment of any interest, rent, or other annual payment, without allowing such deduction, which it declares to be void, *i. e.* void so far as they relate to the property tax, or give any right to the lessor or annuitant to withhold his consent to the allowance prescribed by the act; but it would be monstrous to suppose that the legislature meant, without any apparent necessity for so doing, to avoid the whole deed. This construction is confirmed by referring to sect. 195. which provides that no contract, covenant, or agreement between landlord and tenant, or any other persons touching the payment of taxes, shall extend to the duties charged by that act, nor be binding contrary to its meaning; but that all such duties shall be charged upon and paid by the respective occupiers, subject to the deductions and repayments thereby allowed; *and all such deductions and repayments shall be allowed accordingly, notwithstanding such contracts, covenants, or agreements.* It is evident therefore from this latter section, which may be considered as expounding what the legislature meant in the former section, when it declares such contracts, &c. void, that the construction I have already put upon it is the right one, and that void means, (to borrow the language of this latter section) void so that all such deductions and repayments shall be allowed accord-

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accordingly, notwithstanding such contracts, but that the contract shall remain in force as to all other purposes. I may further observe, that the act uses the same expressions in speaking of the avoidance of contracts to be made after the passing of that act, as of those which had been made before it, and those expressions consequently are susceptible of the same construction which we have now adopted (a).

HEATH J. I agree with my Lord in the construction he has given to this act; which seems to me not inconsistent with the language used and most consonant to justice, and therefore it is our duty to give effect to it. Even in cases where the words and the spirit of an act of parliament have been at variance, the courts have put such a construction on the former, as to make them bend to the attainment of the latter, but there is no such necessity in the present case.

CHAMBRÉ J. At the time when the contract was made, the covenant to which objection has been taken for payment of the annuity without deduction of the property tax was perfectly legal, and not in contravention of any declared public policy of the state; but the statute afterwards intervened and made such unqualified payment illegal. So far therefore as respects the deduction the statute has a retrospective operation to make it void, but it would be doing great injustice to extend it farther than either the words or the intention of the act can be supposed to require. The revenue is protected by the penalties imposed in sect. 115, on persons refusing to allow the deductions, and there is great weight given to the construction now adopted, by the observations which have been made by my Lord on sect. 195. I therefore concur in that construction (b).

Per Curiam,

Rule discharged.

(a) See the case of *Fuller v. Abbott*, *post*. in this term.

(b) *Laurence J.* was absent this day in consequence of indisposition.

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DAVIS v. EDGAR.

July 1.

THE declaration contained several counts framed upon the Defendant's promise to pay 31*l.* 10*s.* to the Plaintiff, in consideration of procuring the Defendant to be gazetted a cornet and sub-lieutenant in one of his majesty's regiments of life guards. There were also counts for work and labour, and for money had and received. At the trial before *Mansfield C. J.* at the *Middlesex* sittings in *Easter* term, the Plaintiff proceeded upon the latter count, only, in respect of which the following facts were proved: The Plaintiff, who was not an authorized army agent, was employed by one *G. C.* and the Defendant, to negotiate between them the sale and purchase of a cornet's commission in one of the regiments of life guards, which *G. C.* then held. The Defendant agreed to give a sum exceeding the price allowed by his majesty's regulations, and accordingly paid to *G. C.* the whole sum agreed upon except 38*l.*, which he retained, with the consent, and under the directions of *G. C.*, to pay over on his account to the Plaintiff for his agency in the business. The sum paid to *G. C.*, after deducting the 38*l.*, exceeded the regulation price by 22*l.* It appeared by several of the Defendant's letters, written in consequence of the Plaintiff's application for the money, that he acknowledged it to be due, and promised to pay it with interest. *Vaughan Serjt.*, for the Defendant, objected on the stat. 48 *G. 3. c. 15. §. 100. (a)*, which he

Where the Plaintiff, who was not an authorized army agent, negotiated the sale and purchase of a commission between *G. C.* and the Defendant at a price above that allowed by his majesty's regulations, and the Defendant, who was purchaser of the commission, after having paid a sum exceeding the regulation price to *G. C.*, retained 38*l.*, the remainder of the price agreed upon, with directions from *G. C.* to pay it over to the Plaintiff for his agency, which he promised the Plaintiff to do: Held that the Plaintiff could not recover against the Defendant the 38*l.* as money had and received to his use, for he could not be in a better situation than *G. C.*, and by 48 *G. 3. c. 15. §. 100. G. C.* could not have recovered beyond the regulation price.

contended

(a) 48 *G. 3. c. 15.* By sect. 100. And whereas great inconvenience has arisen to his majesty's service from persons, not authorized agents of regiments, troops, or companies, negotiating for the purchase and sale of commissions, and much larger sums

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contended made the whole transaction illegal, to the Plaintiff's right to recover, on the ground, first, of the Plaintiff's not being an authorized agent; secondly, of this being a demand of a sum of money for negotiating the sale of a commission; and lastly, of the sum agreed to be given for the purchase, being greater than that allowed by his majesty's regulations. The jury however, under the directions of the learned Chief Justice, found a verdict for the Plaintiff, for 38*l.*, with liberty to the Defendant to move to enter a nonsuit, if the Court should be of that opinion.

Vaughan Serjt. accordingly obtained a rule *nisi* for that purpose on a former day in the same term, renewing his objections. Against which

Shepherd and *Runnington* Serjts. now shewed cause, and insisted that there was nothing in the act which made the purchase of a commission at a price above that allowed by his majesty's regulations illegal as between the parties, although the act imposed a penalty upon the agents negotiating such purchase. But even admitting the contract between *G.C.* and the Defendant to be illegal, that will not preclude the Plaintiff from recovering in this action, which is brought for money left in the Defendant's hands, and received by him, for the Plaintiff's use,

sums than are allowed by his majesty's regulations are often given and received for commissions, and great frauds committed; be it therefore enacted, that every person not an authorized agent of any regiment, troop, or company, who shall negotiate, or act as agent for or in relation to the purchase or sale of any commission in his majesty's forces, and also every authorized agent as aforesaid, who shall take, ac-

cept, or receive any commission, or sum of money, or reward, for negotiating the purchase or sale of any such commission, or acting as an agent in relation thereto, shall forfeit for every such offence the sum of one hundred pounds, and treble the sum which shall be given or received for or in relation to any such commission, over and above the sum allowed by his majesty's regulations.

and

and is therefore as much the money of the Plaintiff as if it had been paid to him in the first instance, and the Defendant, who received it as such, cannot now be allowed to retain it, by disputing the legality of the original consideration. [*Mansfield* C. J. asked how the Defendant could be said to have received money from *G. C.* which had never been paid to him by *G. C.*]. There is no difference between an actual payment to a person of a sum of money, and a deduction made to that amount out of a sum due from that person: the deduction made by the Defendant is precisely the same thing in substance, as if the Defendant had paid the whole price to *G. C.*, and *G. C.* had afterwards returned 38*l.* to the Defendant, in form only it is different; and the Defendant, by his letters, in which he acknowledges having received the money for the Plaintiff, and promises to pay it with interest, has shewn that he so considered it. This is not the case of one of the parties to an illegal contract refusing to complete it by availing himself of its illegality; for the Defendant waived all objection on that ground, when he came to a settlement with *G. C.*; it is therefore like the case of *Tenant v. Elliott*, 1 *Bos. & Pull.* 3., where it was held that the Defendant, who had received money to the Plaintiff's use, should not be at liberty to set up as a defence, that he received it upon an illegal contract between the Plaintiff and a third person.

Vaughan Serjt. *contra*. The sum recovered by the Plaintiff is not money had and received by the Defendant to the Plaintiff's use, but is money retained and withheld by him out of a sum which the law has forbidden him to pay; and, therefore, the Defendant is well entitled to withhold it. It is said, that the statute has not made it unlawful to give more than the regulation-price: it has not done so expressly, but it has imposed a penalty upon every agent who shall negotiate the sale or

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purchase of a commission at a higher rate than allowed, of treble the sum which shall be given or received in respect of any such commission, over and above the sum allowed by his majesty's regulations. This, therefore, is a strong legislative prohibition of any such sale or purchase. Here it appears that the Defendant has already paid a sum exceeding the regulation-price, and yet the Plaintiff claims 38*l.* in addition to that sum; and that too on account of brokerage, which the statute has also made illegal in him to receive. The case of *Tenant v. Elliott* does not apply, unless the withholding from *G. C.* a sum of money which the Defendant had a right to withhold, is equivalent to a payment to *G. C.*, and a subsequent receipt from him of that sum to the Plaintiff's use. It has indeed been assumed in argument to be equivalent, but no authority has been cited for such a position.

MANSFIELD C. J. It is quite clear that *G. C.* never could have recovered this sum of 38*l.* from the Defendant, because it was a sum exceeding the regulation-price; and it appears that he has already received more than that price. If then *G. C.* could not enforce the payment, how can the Plaintiff, who derives his claim through him, stand in a better situation? I am of opinion that there must be a nonsuit. (a)

The rest of the Court concurred.

Rule absolute.

(a) *Lawrence J.* was absent this day in consequence of indisposition.

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WARDEN v. BAILEY.

June 28.

THIS was an action brought against the Defendant for assaulting, and wrongfully imprisoning the Plaintiff in a damp and unwholesome cell, by which he became sick, &c. There were other counts for a common assault. The Defendant pleaded the general issue. Upon the trial of this cause, at the *Bedford* Spring Assizes 1811, before *Grose* J., the evidence was, that the Plaintiff was a permanent serjeant in the *Bedford* regiment of local militia, of which the Defendant was the adjutant: that in *November* 1809 the colonel of the regiment issued a regimental order for establishing an evening school at *Bedford*, of which he appointed the serjeant-major of the regiment the master, and ordered that all the serjeants and corporals, including the Plaintiff, and thirty or forty other persons, part of whom were under martial law, and part were not, should attend the school every evening, in order that they might learn to read and write, and that they should each pay eight-pence per week, viz. 6*d.* as a gratuity to the master, and 2*d.* as a contribution towards the expence of lights and fires in the school. After a few days several of the scholars, and amongst others the Plaintiff, omitted to attend. Several of them were afterwards tried by a court-martial for this offence, and being found guilty, were punished for it. The Plaintiff was reprimanded for his conduct; and promised to attend more regularly in future. Shortly after he was ordered to attend a drill upon the parade with a few others, at which time the Defendant came out of his shop, which was adjoining, and addressing himself to the Plaintiff, and shaking his fist at him, called him a rascal, and told him he deserved to be shot: he then directed a serjeant, who stood near, to draw his sword,

An action of trespass lies for an inferior military officer against his superior officer (both being under martial law,) who imprisons him for disobedience to an order made under colour, but not within the scope of military authority.

Although the imprisonment be followed by a trial by a court-martial.

The colonel of a regiment has no authority to order his serjeant to pay money towards lighting and warming a regimental school and school-master's salary.

Nor, as it seems, to order them to attend school, to learn to read and write.

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and hold it over the Plaintiff's head, and if he should stir, to run him through: and he ordered a corporal to set a guard of corporals over the Plaintiff. The corporal, by the Defendant's direction, took off the Plaintiff's sash and sword. The Defendant directed another serjeant to take him to the county gaol of *Bedford*, to deliver him to the goaler, with orders to cause him to be locked up, and to live on bread and water, and to prevent any person from having access to him. That serjeant accordingly delivered him to the goaler, with verbal directions to keep him in solitary confinement, and that he should live on bread and water; no other warrant for his commitment was at that time delivered to the goaler: the goaler received him, and kept him in close custody for three days, at the expiration of which time he was brought up before the colonel, who then came into the town, and the Defendant, and other officers of the regiment, and was again remanded to the custody of the goaler. After some weeks confinement, the Plaintiff's health being impaired, he was conducted to his own house, and there kept a close prisoner. No charge was made against him at the time of his arrest on the parade, except that which was involved in the Defendant's assertion, that the Plaintiff had done enough to be shot for. The counsel for the Plaintiff said, he anticipated that the Defendant's defence would be, that he was arrested on a charge of mutinous language, and exciting others to mutiny, which in truth was the case, though the cause was stopped before the Defendant proceeded to give evidence of that fact: the words for which he was so charged were, that he had been heard to say on the parade, to *Cooper*, another serjeant, Do not give up; I will not go to school; do not you go to school: I will not abide by a regimental court-martial; I will have a general court-martial: and in anticipating this defence, the Plaintiff's counsel read the charge which was exhibited against

against the Plaintiff before the court-martial, and which was, that though acquitted himself by a court-martial of neglecting to attend the school, he had excited others to disobedience by this language. The Plaintiff's counsel addressed some questions to the Defendant's witnesses on cross-examination, upon the answers to which it appeared, that in *January* 1810 the Plaintiff was conveyed to *Stilton*, and tried by a court-martial, afterwards, in *March* 1810, he was liberated. The Plaintiff proved the amount of payments made to his witnesses, and other expences incurred in his defence. *Sellon* Serjt., for the Defendant, objected that no action could be maintained by a person under martial law, against a superior officer, acting also under martial law, for any thing whatever, done by him under colour of military authority. He asserted that this principle was established by the case of *Sutton v. Johnstone*, 1 T. R. 493. *Grose* J. thought that, after that decision, he was incompetent, sitting in a court of common law, to try the propriety of the arrest, and nonsuited the Plaintiff.

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Frere Serjt. in *Easter* term had obtained a rule nisi to set aside the nonsuit, and have a new trial, upon the ground that there had been a misdirection; for that there were two points made in the case of *Sutton v. Johnstone*; 1. that there was a probable cause for the admiral's proceeding; 2. that both parties being under martial law, the action could not be maintained: but the better opinion, he said, was, that the judgment proceeded upon the ground that there was a probable cause. [*Heath* J. agreed to this, and observed that there was no excess of jurisdiction in that case. *Lawrence* J. Lord *Mansfield* held that the action could not be supported, because the declaration shewed probable cause, and though the inclination of his opinion was that no such action could be maintained, yet he said it was not necessary to decide on

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that point, for the facts did not raise the argument.] *Frere* mainly relied on the doctrines of the Court of Error in that case for supporting the present action, contending that it was only decided there, that case was not the proper form of action, but that it was admitted that trespass would lie; and he contended that the acts now here complained of, were not within the scope of military authority, though done under colour of it. He referred to the case of *Wall v. Macnamara*, cited 1 T. R. 536. 502. and observed that the Plaintiff *Wall* was afterwards hanged for the same act for which he had himself recovered damages against *Macnamara*. [Lawrence J. instanced the case of *Barwis v. Keppel*, 2 Wils. 314. as differing from this, because what was there done, was done *flagrante bello* in the face of an enemy, and observed that an action had been brought against Colonel *Bailey*, colonel of the *Middlesex* militia, for flogging a private in the militia, in which the jury gave 600*l.* damages; but that though both were under martial law, the objection was never taken, that the action was on that account not maintainable. Mansfield C. J. noticed the case tried before himself, [reported in 2. *Macarthur On Courts Martial*, 4 ed. 195.] of *Moore v. Bastard*, which was an action against the president of a court martial, for imprisoning the Plaintiff upon an alleged charge of subornation of perjury supposed to have been committed by the Plaintiff, and in which action the jury gave 300*l.* damages, and no new trial was ever moved for. Heath J. mentioned the case of *Reynolds v. Kennedy*, 1 Wils. 232. where, although the action failed, the Court held that an action might well be sustained for a wrongful proceeding in an inferior jurisdiction, and another action brought against the officers of the *Devon* militia for inflicting 1000 lashes on the Plaintiff, in consequence of the sentence of a court martial pronounced, awarding that punishment upon a charge of mutiny, which was tried before *Per-*

vott B. at the *Exeter* spring assizes in 1763; the only mutinous act being, that the Plaintiff had written a letter to the colonel which was not communicated to any one else, telling him, that the men of the regiment were discontented. The jury gave 500*l.* or 600*l.* damages.] *Frere* also mentioned the case of an action against Captain *Tonyn*, in which the Plaintiff recovered damages for the infliction of several dozen lashes, without a court martial, for a single offence, therein exceeding a custom which has prevailed in the navy, that commanding officers do inflict one dozen lashes, which is called a starting, without a court martial. He also cited *Rafael v. Verelst*, 2 *Bl.* 983. for the opinion of *De Grey* C. J. that trespass was the proper remedy.

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Sellon and *Blosset* Serjts., in this term, shewed cause against the rule. They endeavoured to establish three positions. 1. That the Plaintiff and the Defendant, at the time of the grievance, were both subject to martial law. 2. That no action can be maintained by an inferior officer subject to martial law, against his superior officer, being also subject to martial law, for any imprisonment inflicted by the latter, in his military character, preparatory to the prisoner being brought to a court martial, upon a charge, for which the inferior officer is afterwards tried by that court martial, whether such trial be followed by a sentence of acquittal or not; provided that in bringing the party to such court martial, nothing be done wantonly or oppressively. 3dly, That the orders issued by the colonel, were strictly within the scope of his military authority, and that the attempt to excite disobedience to them was a mutinous act, which, according to martial law, warranted the Defendant in all that he had done. As to the first point, by the stat. 48 *G.* 3. c. 111. s. 6., all powers, provisions, rules, regulations,

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exemptions, penalties, forfeitures, clauses, matters, and things, contained in the act 42 G. 3. c. 90., or in any other act in force relating to the militia of *England*, shall, (so far as the same are applicable, and can be applied to, and for the purpose of carrying that act into execution, and are not thereby altered, varied, or repealed,) be used, exercised, and put in force for the raising the local militia, and for the training and exercising the same, as the regular militia may be trained and exercised. And by 42 G. 3. c. 90. §. 89., during such time as any militia shall be assembled for the purpose of being trained and exercised, all the clauses, provisions, matters, and things contained in any act of parliament which shall then be in force for the punishing mutiny and desertion, and for the better payment of the army and their quarters, and in the articles of war made in pursuance of such act, shall be in force with respect to such militia, and to all the officers, non-commissioned officers, drummers, and private men of the same, in all cases whatsoever, but so that no punishment shall extend to life or limb; and it shall be lawful for the officer commanding and present with any detachment or division of militia, called out to exercise, under any of the provisions of that act, to order, when he shall think it necessary, a regimental court-martial to be held for the trial of any offence committed by any serjeant, corporal, drummer, or private man under and during his command. And by §. 103. every adjutant, serjeant-major, serjeant, corporal, drum-major, and drummer of the militia, shall be at all times subject to any act which shall be in force for punishing mutiny and desertion, and for the better payment of the army and their quarters, and to the articles of war, under the command of the colonel or other commandant of the regiment, battalion, or corps to which he belongs; and it shall be lawful for the colonel, or other commandant, of any regiment, battalion,

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or corps of militia, to direct the holding of courts-martial as thereafter directed, for the trial of any serjeant-major, serjeant, corporal, drum-major, drummer, or private man of such regiment, &c., by either a general or regimental court martial, for any offence against the said act, or articles of war, committed during the time such regiment, battalion, or corps shall not be embodied. . And by *f. 105*. Any serjeant, corporal or drummer of the militia, may, by sentence of a court martial, be reduced to the condition of a private militia-man. And by *f. 107*. All the serjeants, corporals, and drummers in every regiment, battalion, and corps of militia, shall constantly be resident within the city, town, or place, where the arms belonging to such regiment, battalion, or corps are kept, and shall be under the command of the adjutant, who shall also be constantly resident within the said city, town, or place, unless as thereafter provided, and shall act in such command under the orders of the colonel or other commandant of such regiment, battalion, or corps; and that the adjutant, and in his occasional and unavoidable absence, the serjeant-major, and where there is no serjeant-major, the senior serjeant, shall make monthly returns of the true state of the serjeants, corporals, and drummers of the regiment, battalion, or corps, severally, to his majesty's secretary of state, to the lieutenant of the county, and to the colonel, or other commandant of the regiment. The first point therefore, is clearly established, that the Plaintiff and Defendant were both within the martial law. As to the second point, they minutely commented on the facts and doctrine of the case of *Sutton v. Johnstone*. It was there alleged in the declaration, that the Plaintiff was charged wrongfully and maliciously with disobedience of orders, wrongfully arrested, tried, and acquitted. The declaration therefore contained all the facts which are stated on the declaration in the present case: that decision could not have proceeded merely

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merely on the ground that an action upon the case was not the proper form of declaration : if it did, the Defendant in error, who had recovered 5000*l.*, and 6000*l.* in two successive verdicts, would not have been so ill advised as to lose those damages for want of delivering another declaration in trespass. There never was a case attended with greater hardship on the Plaintiff below than that. And if that was decided upon the broad ground that no action at all could be supported, surely an action for trespass *ab initio* cannot be maintained here. And even if that decision proceeded on the ground that the form of action was misconceived, yet if the facts of a case were reduced to a special verdict, it would be seen how small a difference is created by the form of action. The distinction, indeed, between case and trespass was there never taken. The argument chiefly insisted on, was, that no action would lie ; that if it would, the discipline of the navy would be affected, and no superior officer would dare to act with vigour. It was urged to be a case within the same principle, on which no action will lie against a Judge for his judgment, or a juryman for his presentment. That it was the duty of a superior officer to bring offenders to trial, either on his own knowledge or on his information and belief ; and that if such an action could be maintained, it would necessarily require in those who tried it, a knowledge which they do not possess. All the same arguments are applicable to this case. There is not a single offence against the military law of the country which can be tried by a jury. It is therefore impossible for them to try whether the charge of such an offence was properly made or not, inasmuch as they cannot try the charge itself. The reasons assigned by Lord *Mansfield* C.J. and Lord *Loughborough* C.J. for reversing the judgment of the Court of Exchequer-chamber, 1 *T.R.* 546., are exceedingly strong, and their judgment was confirmed in the House of

Lords, 1 *Bro. P. C.* 2d edit. 100. [*Lawrence J.* I have heard from good private information that the reasons assigned by Lord *Mansfield* for reversing the judgment of the Court of Exchequer-chamber, were not adopted by the House of Lords, though the judgment of the Chief Justices was affirmed.] The 23d article of the 16th section of the military articles of war provides for the speedy administration of justice by a military court-martial, as the 33d, cited by Lord *Mansfield*, does in relation to naval courts-martial. Inasmuch as the judgment of the Chief Justices was affirmed, it is fair to conclude that the House of Lords held, whatever might be the reasons of their judgment, that no action could be supported against a superior officer for bringing an inferior officer to a court-martial, nor for the preparatory arrest and imprisonment. The cases which will be cited on the other side, stand on a very different ground; *Mossyn v. Fabrigas*, 1 *Cowp.* 161. [*Lawrence J.* denied that that case had any application to this.] *Wall v. Macnamara*, *Swinton v. Molloy*, 1 *T. R.* 537. *Sutherland v. Murray*, *ibid.* 538. By the 12th article of the 16th section of the articles of war, any officer committing a crime deserving punishment, is to be put under arrest; only common soldiers are to be imprisoned; but Mr. *Wall*, who was a captain, was kept imprisoned for nine months, and his confinement aggravated by many circumstances of cruelty. Besides, Lord *Mansfield's* arguments in that case are not applicable to an action of trespass for false imprisonment, but only to case. He speaks of the motive, which has nothing to do with false imprisonment. That case, as well as *Swinton v. Molloy*, is also disposed of, by the circumstance, that in neither of them was the imprisonment followed by a court-martial. There, likewise, the Defendant had imprisoned the Plaintiff three days without inquiring into the case, contrary to the discipline of the navy. In *Sutherland v. Murray* there was no pretence to say, that the Plaintiff,

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who was Judge of the vice-admiralty court, was subject to military authority. In the case of *Frye v. Ogle*, 1 *Macarthur on Courts-Martial*, 4th ed. 269. and Appendix, No. 24. p. 437. the Defendant, who was president of a court-martial, had sentenced the Plaintiff to fifteen years imprisonment, and to be rendered for ever incapable of serving his majesty, after he had already been fourteen months in close confinement; so that the hardship of the case may probably have had weight: but the case cannot be law; for the imprisonment there was clearly legal at first, and it was only the excess that could be complained of, for which excess trespass would not lie. [*Lawrence J.* It does not appear that the Plaintiff was legally imprisoned at first, for his only offence was his requiring a warrant in writing, in order to justify him in taking another officer into his custody under an arrest, which is no offence.] As to *Moore v. Bassard*, the Plaintiff, so far from being subordinate to that court-martial, was probably a senior to all the officers who composed it. And as to the occasion of his commitment, it has been again and again decided, that although acts of parliament give power to courts-martial to compel the attendance of witnesses, yet when they do attend, the Court cannot compel them to speak, or commit them for a contempt. [*Mansfield C. J.* That point was never made in *Moore v. Bassard*.] At all events, that case did not bring in question the extent of military authority, it only respected the constitution of courts-martial. But in the case of *Grant v. Gould*, 2 *H. Bl.* 69. Lord *Loughborough C. J.*, though he fully admits the power of the courts of *Westminster-hall* over courts-martial, in cases of excess of their jurisdiction, admits with equal distinctness the absolute and exclusive authority of those courts in matters of military discipline. [*Lawrence J.* That was an application to the Court for a prohibition to prevent a court martial from proceeding to execute their

sentence upon the Plaintiff, who contended he was no soldier; but whether he was or was not a soldier, was one of the questions the court martial had before them to try.] In like manner it was a question for the court-martial to try, whether this Plaintiff was guilty of disobedience in a matter of military discipline or not. But if this action is maintainable, where will it stop? The commander in chief was consulted; he directed the court-martial to be held; an action therefore lies against him as well as against all the members of that court which sat on the Plaintiff; for although the order for it is under the king's sign manual, the sign manual alone cannot give jurisdiction. It is admitted that the sentence of guilt or acquittal, pronounced by that Court, cannot vary the case. If it be held that the Plaintiff is entitled to recover in this case, it will follow that he might lawfully have resisted the order; and if in that resistance he had been killed, then, according to *Wall's* case, as well the persons who executed the order, as the persons who gave it, would have been guilty of murder. So, if the case tried before *Perrott* B. be law, it would follow that if the Plaintiff had died under the lashes, all the members of the court-martial would have been liable to be hanged. [*Heath* J. Undoubtedly they would.] It is no hardship that the Courts will not entertain this species of action, for as the naval code has provided a remedy for the abuse of naval authority, so has the military code. By the stat. 43 G. 3. c. 20. s. 24. which is similar to 41 G. 3. c. 11. s. 18., and to 53 G. 3. c. 17. s. 34. his majesty is empowered to form, make, and establish, articles of war, for the better government of his majesty's forces, which articles shall be judicially taken notice of by all judges, and in all courts whatsoever. And by s. 12. of the articles of war, article 1. If any officer shall think himself wronged by his colonel, or the commanding officer of the regiment, and shall upon due application made to him,

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him, be refused to be redressed, he may complain to the general commanding in chief his majesty's forces, in order to attain justice; who is thereby required to examine into such complaint; and either by himself, or by his majesty's secretary at war, to make his report to his majesty thereupon, in order to receive his majesty's further directions. And by the 2d article of the same section, if any inferior officer, non-commissioned officer, or soldier, shall think himself wronged by his captain, or other officer commanding the troop or company to which he belongs, he is to complain thereof to the commanding officer of the regiment, who is thereby required to summon a regimental court-martial, for the doing justice to the complainant, from which regimental court-martial either party may, if he thinks himself aggrieved, appeal to a general court-martial; but if, upon a second hearing, the appeal shall appear to be vexatious and groundless, the person so appealing shall be punished at the discretion of the said general court-martial. The legislature and the crown having therefore provided this specific remedy for injuries of this description, it must be taken that no remedy by action subsists. [*Lawrence J.* A court-martial cannot give damages for injurious conduct, as a jury can.] The court-martial before which a charge is tried, is the only tribunal competent to enquire, whether the accusation was malicious or not, and whether it was made with or without probable cause, and if it is groundless, they severely punish the prosecutor, often to the extent of dismissing him the service, as in the case of *Fynmore* and *Titcomb*, 2 *Macarthur*, 4 ed. 335, 6. As to the third point, the sort of offences which are punishable by military law, are defined by stat. 49 G. 3. c. 12. s. 21. (which is in terms the same as 48 G. 3. c. 15. s. 21. and as 47 G. 3. s. 1. c. 32. s. 20.) whereby general courts-martial are empowered, by their sentence or judgment, to inflict corporal punishment,

ment, not extending to life or limb, on any soldier, for immoralities, misbehaviour, or neglect of duty. By the 24th section of the articles of war, clause 1. it is enacted, that no officer, non-commissioned officer, or soldier, shall be adjudged to suffer any punishment extending to life or limb, by virtue of these rules or articles, within the *United Kingdom, Jersey, Guernsey, Alderney, Sark and Man*, and the islands thereto belonging, except for such crimes as are therein expressly declared to be punishable with the same; but, by the 2d clause, all crimes not capital, and all disorders and neglects which officers and soldiers may be guilty of, to the prejudice of good order, and military discipline, though not specified in the said rules and articles, are to be taken cognizance of by a general, or regimental court martial, according to the nature and degree of the offence, and to be punished at their discretion. The act for which the Plaintiff was brought to a court martial was a military offence within these definitions. And therefore, even supposing that a superior officer has not jurisdiction to arrest an inferior, except for a breach of a military duty, the present nonsuit must stand. In the first place, it is not necessary that the offence should be demonstratively proved, before the arrest, otherwise the offender could not be arrested until after trial by a court-martial and sentence passed. The expression in the 12th article of the 16th section, that whenever an officer shall commit a crime, he shall be put under arrest, does not mean, when he shall be actually convicted; but when he shall be supposed to have committed a crime. It is sufficient ground of arrest, if either there be probable cause to suspect him of committing an act, which is clearly a breach of military duty, or if he commit an act, which there is reasonable ground for arguing to be a breach of military duty. The true nature and extent of military duty is, to obey in all things which are not positively illegal,

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illegal, and it is the duty of the officer to command. The counsel for the Plaintiff take far too narrow a view of the military relation, when they suppose it to be a contract to perform particular acts, and that if a special pleader gives his opinion that a certain act is not within the soldier's contract, therefore he may justifiably resist the order. The general purview of the articles of war, shews, that a soldier gives himself up wholly to his officer, in religion, politics, civil relations, loyalty, internal and external behaviour. But it is not necessary for the present purpose, to go so far as that. It is admitted that an officer may both require a soldier to perform his military exercises, and may compel him to learn them. All the witnesses agreed that it was a part of the military duty of a serjeant to be able to write. He is required to make monthly returns in writing, by stat. 42 G. 3. c. 90. s. 107. It is therefore equally within the scope of his duty to learn to write, that he may be able to discharge that duty, or to learn to write better than he did at entering the corps, that he may better discharge it: the Plaintiff introduced an extraordinary piece of evidence; he put in a paper signed with his name, in his own hand-writing, in order to prove that he could write well enough, and that it was unnecessary he should be taught to write better: but that question it was not competent for the Judge and jury, but for his military superiors, to decide. The order was made in mercy to him, for he was punishable if he could not write well: the argument, then, turns on a nice distinction: his officer may imprison him for not being able to write, but not for refusing to learn. [*Lawrence J.* It is no part of the military duty to attend a school and learn to write and read. If writing is necessary to corporals and serjeants, the superior officers must select men who can write and read; and if they do not continue to do it well, they may be reduced to the ranks: nor is it any part of military duty

to pay for keeping a school light and warm : this very far exceeds the power of any colonel to order.] There was nothing illegal in the colonel's order. The Plaintiff and all the other scholars acquiesced in it; they either attended the school, or, when they absented themselves, upon being reprimanded, they promised obedience. They never disputed the legality of the order. And the duty of the adjutant to his colonel required that he should enforce it, and the duty of the serjeant required that he should obey it. For breach of that duty he was properly arrested, preparatory to being brought to a court-martial. It has been the practice in many regiments, both of militia and troops of the line, to establish such schools, and enforce attendance. But if the practice had been doubtful, (and many general officers were called to establish it,) a jury could not have tried that question. There is no hardship in the order; many more grievous orders respecting the whickers, tails, and dresses of the troops are daily issued and acquiesced in. The order for attending the school was clearly a military order, and the refusal to go was a military offence, for which the Plaintiff might properly have been brought to a court-martial; but the offence for which, in truth, he was brought to a court-martial, was, for using mutinous expressions, exciting others not to go to school; and though these facts came not from the mouth of any of the witnesses, yet as they came from the statement of the counsel for the Plaintiff in his opening, it is allowable to assume them as facts in the cause. [Lawrence J. If the facts had come out on cross-examination, it would have been allowable; but suppose, in a cause depending on a will, the counsel for the Plaintiff anticipates that the defence will be the insanity of the testator, and directs his questions to disprove the insanity, that course of examination is no proof of the testator's insanity. If a counsel states facts on which a Plaintiff means to re-

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cover, and they are insufficient to support his action, he must be nonsuited, but he is not to be nonsuited upon his statement of what he thinks will be urged against him. *Chambre J.* It appears by the Judge's report, that the imputed offence was disobedience to the order to attend school.] It was in evidence upon the Plaintiff's cross-examination that the Plaintiff was escorted by a file of corporals from *Bedford* to *Stilton* to be tried by this court-martial, and the Plaintiff proved the sum he had paid the witnesses for their attendance. [*Mansfield C. J.* I think, after this, it may be assumed that there was a court-martial.] Whatever then was the offence, it became the subject of judicial inquiry, and warrants the preparatory imprisonment. As to the time which elapsed between the arrest and the court-martial, it was expressly decided in *Sutton v. Johnstone*, that that circumstance was no ground of action. There is not on the Judge's notes any evidence of excess of imprisonment. As to the place of imprisonment, the law looks to the person of the sheriff for the safe custody of his prisoners, not to the place where they are kept. At common law even criminal prisoners might be kept any where; and at this day, he who has right to arrest a man, may employ a stranger to keep him. It is admitted, he might be imprisoned in his own lodgings: why not then in the gaol? there could be no more proper place for the custody of the Plaintiff than the county goal of *Bedford*, which is an extremely well regulated, airy, warm, and well-ventilated prison, whereas there was no fire in the military guard-room; and in many instances the law particularly directs that offenders shall be lodged in the county goal; so that it is not only in general a place equally proper for the confinement of a prisoner, as any other, but in many cases is much more proper than any other. As to the delay, a period of three years is given for calling a court-martial; but the

the fact was, that in the present case the colonel applied to the commander in chief for a court-martial as soon as he was apprised of the occasion, and all the subsequent delay intervened in the office of the commander in chief. The ticket containing the offence of the prisoner, and the other forms required by the articles of war, are prescribed for the benefit and security of the person taking the custody, not of the prisoner. If, however, any action could be maintained against the Defendant, it must be an action on the case, not of trespass, for it was the adjutant's duty, if he thought any offence had been committed, to order the Plaintiff into confinement. That, therefore, was a legal act, and could not be trespass *ab initio*; and, consequently, the continuation of the act could not become trespass afterwards.

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Lens Serjt., and *Frere*, in support of the rule. The weighty and momentous points which the Plaintiff endeavoured to raise, do not come before the Court upon this occasion. The only question before the Court is the proposition that has been so broadly laid down, that the action is stopped *in limine*, if the parties were military persons, and if the act were done in a military capacity, no matter how groundless, or excessive the act be, no matter what the one party is bound to do, or the other to enforce. *Sutton v. Johnson* does not establish this proposition; and the material distinction between this action and that, is, that that was an action upon the case, and that form of declaration necessarily admits that the act complained of was legal in its form, and is only complained of on the ground of its abuse. The act here complained of is an act not within the scope of military authority, and therefore the Plaintiff is entitled to recover for it. The supposed analogy to actions on the case does not exist in this action. Case admits the legality of the act, and lies for the excess or abuse of it:

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trespass denies the legality of the act, and puts the Defendant upon proof, that it is legal. As to the legality of the order, it never was in evidence that the order for payment of the 8*l.* per week was countermanded or dispensed with; and that order was decidedly illegal. The only evidence respecting it was, that the sum was not known to have been paid. This point alone would secure the Plaintiff a new trial, in order to ascertain whether the military officer possesses the power of taxation, over that pay, to which the soldier is entitled by the mutiny act. But it is not true that the soldier, by the terms of his service, is left wholly destitute of every civil right. If that were so, he could have no property; he could never inquire into the excess of jurisdiction. There may be questions of nicety in particular cases; but it can never be, that a subject, by embracing the military profession, becomes an outcast from the law of the land, and can appeal only to the military law for redress. *Frye v. Ogle* was a very striking instance, where, while two of the Judges of the military court were in the very exercise of their judicial duty, they were seized and conducted to prison at the instance of the individual against whom they had transgressed their jurisdiction. That case determined too, that it was not sufficient for the Defendant's justification, that the imprisonment should be followed up by a court-martial at some time or other, no matter how distant. It is unnecessary to expatiate on the cases of *Moslyn v. Fabrigas*, *Wall v. Macnamara*, and the residue of that class, none of which could have ever existed, if it had been a sufficient answer to every complaint, that the parties were acting in a military capacity, for that would have made it unnecessary to inquire into any circumstances of aggravation. Every mutiny act contemplates that actions may be brought for things done in a military character, for it gives the plea of the general issue. In this case there

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was not even any evidence that the Plaintiff had refused to obey the order to go to school: he had absented himself once, and had again attended: and the Defendant, finding himself unable to substantiate that charge, has recourse to another supposed ground, of the Plaintiff's inciting others to disobedience, of which there is no proof. The length of imprisonment which was inflicted, was not only not justified, but by the 23d sect. of the 16th article of war, it is expressly provided, "that no officer or soldier, who shall be put in arrest or confinement, shall continue in his confinement more than eight days, or until such time as a court-martial can be conveniently assembled." That clause, therefore, throws it on the officer making the arrest, to shew that he made it with a view to a court-martial, and that a court-martial could not be sooner assembled: but there is not the slightest evidence in this case, to connect the arrest with the court-martial which happened some months after, or to shew that both were for the same cause, or that the delay arose from the cause alleged. There was also a considerable portion of unnecessary violence and indignity in this case, even if the right to arrest had existed; and for that excess of jurisdiction, according to the cases, trespass well lies. The Defendant's whole authority, then, rests on this clause, it was for him to shew, that either he tried the Plaintiff within eight days, within which time the articles of war presume that a court-martial may be obtained, or that he applied for a court-martial, and did his best endeavours to obtain it within eight days. It is not now the question, whether the facts, if proved, would be an answer to the action, but whether the nonsuit shall stand, which proceeded on the ground that it was unnecessary to go into the facts. That of which the Plaintiff complains is, that at the trial the Defendant was never put on his defence. *Grant v. Skard, B. R. Hil. T. 24 G. 3.* That was an action for an assault: the Defendant was an offi-

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cer as well as the Plaintiff. The Plaintiff was directed to give a military order: he sent two persons, and they failed. The Defendant said, What a stupid person you are; and twice struck him; and although the circumstances occurred at *Gibraltar*, and in the actual execution of military service, it was held the action lay. And though Lord *Mansfield* C. J. was very desirous to set aside the verdict which had been found for the Plaintiff, with 20*l.* damages, the Court refused a new trial. This directly contradicts the position that a military man can have no remedy against ill-treatment received from another, but only by a court-martial, which can give no damages. The Plaintiff could already read and write, so that the order, so far as respected him, was perfectly unnecessary. The mutiny act authorizes no other confinement than what is necessary to secure the appearance of the delinquent; it does not authorize a committal to the county gaol. The 24th article of the 16th section of the articles of war requires that a prisoner shall be committed to the charge of the officer commanding the guard, or of the provost martial, and that the officer committing him shall, at the same time, deliver an account in writing, signed by himself, of the crime with which the prisoner is charged. But in the case of deserters an express authority to use the gaol is given. [*Mansfield* C. J. That provision was introduced to make it the duty of the gaoler to receive the prisoner, which otherwise he was not compellable to do. But he was not bound to receive this soldier.] The 26th article of the 16th section requires the officer or provost martial, within 24 hours after the commitment, to give in writing to the colonel or commanding officer of the regiment to which the prisoner belongs, his name, crime, and the name of the officer who committed him; neither of which requisites was proved to have been complied with in the present case. If there be not a charge in writing, the
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officer may refuse to receive the prisoner; and it may thence be inferred that it is illegal to commit him without such a charge. The Plaintiff made repeated applications to the gaoler for a copy of the charge against him, and it was not till after great part of his imprisonment was over, that he could obtain it. [*Lawrence J.* The clause certainly contains provisions very advantageous to the prisoner, and such as, if properly complied with, lead to his trial and liberation, none of which are applicable to a common gaoler.] To give the officer who arrests, a jurisdiction, it is necessary that a crime should have been committed. It may be doubted, whether an accusation only of a crime would justify an arrest. In the present case the Defendants repudiate the charge, for which, as appears by the evidence, the prisoner was committed, and endeavour to set up another, of which there is no proof. At the trial, it was requested, on the part of the Plaintiff, that all these things might be gone into, but the counsel for the Defendant refused, and chose to stand on the point of jurisdiction. It was at least incumbent on the Defendants to shew that all the rigour which was practised towards the Plaintiff was necessary to secure his appearance at the trial; and why it was continued beyond the eight days, which the articles of war presume will be sufficient for procuring a court-martial; and unless this be shewn, even though the imprisonment for the eight days were lawful, the confinement on the ninth and every subsequent day is a new act of false imprisonment without any new assignment. [*Lawrence J.* observed, that *Frye* brought his action of trespass against *Ogle*, for the acts which the court-martial, whereof he was president, did in excess of their jurisdiction; and it was held, that when they exceeded their jurisdiction, trespass lay: but he intimated, that as there was another action pending against the colonel, in consequence of his having, when the Plaintiff was brought

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up on the third day, again remanded him to prison, the Plaintiff could not recover against this present Defendant for any longer period than the three days imprisonment, and that two several actions could not be sustained against several for the same act of imprisonment. If two commit a tort, and the Plaintiff recovers against one, he cannot recover against the other for the same tort (a).]

MANSFIELD C. J. This is an application to set aside a nonsuit. It is an action for false imprisonment brought by a serjeant in the local militia against the adjutant in that militia. The evidence is simply this; an order was made by the colonel that the serjeants and corporals should attend an evening school for the purpose of learning to read and write; the serjeant-major was to be the schoolmaster, and all the men were to pay 8d. per week to defray the schoolmaster's salary and the expences of fire and candles. Therefore it was, first, an order to attend a school for learning to read and write; secondly, it was a tax of payment of money. The Defendant's counsel have admitted, properly, I dare say, that the Plaintiff was not imprisoned for disobedience to this order, but for supposed mutinous expressions: of them, however, is no evidence. The learned Judge was desired to nonsuit the Plaintiff upon the ground of a doctrine, supposed to be established by the case of *Sutton v. Johnstone*, that an inferior officer cannot maintain an action against a superior officer for imprisonment inflicted in consequence of disobedience to any command whatsoever, issued by the superior to the inferior officer. To be sure, that is a very wide inference to draw from *Sutton v. Johnstone*, that being only a case of imprisonment for disobedience to the orders issued in the heat of a battle, where obedience, and instant obedience, is necessary.

(a) Over-ruling a gratuitous case of *Frye v. Ogle*, 2 Macarthur, 4th ed. 269.

Lord *Mansfield* and Lord *Loughborough* do not decide this point; they expressly avoid determining it, though they intimate a very strong opinion, and observe that it is a very important case, and send it to the dernier resort. The only point therefore decided in *Sutton v. Johnstone*, is, that there was probable cause for the imprisonment in that case. Here it is admitted by the Defendant, that it is not for disobedience to the order that the imprisonment was inflicted, but for mutinous expressions, which were not proved; so that the event of this motion is not made directly to depend upon the legality of that order. But with respect to the order itself, it might indeed be very convenient that a military officer might be enabled to make the men under his command learn to read and write, it might be very useful, but is not a part of military discipline. Then, further, there is a tax of 8*d.* per week for learning to read and write. Now if the House of Lords had inserted in an act of parliament, that serjeants and corporals should pay 8*d.* per week for learning to read and write, the bill, on coming down to the Lower House, would certainly have been thrown out; and clearly a commanding officer of a regiment cannot impose that tax. We think then that the order to attend the school most probably was bad, and an excess of authority, but the order of taxation was certainly so; and that order was never rescinded. The subject cannot be taxed, even in the most indirect way, unless it originates in the lower house of parliament. We therefore think the rule must be absolute for a new trial, but I must express the strongest wish that the cause will not be again tried; for all disputes respecting the extent of military discipline are greatly to be deprecated, especially in time of war: they are of the worst consequence, such as no good subject will wish to see discussed in civil action: they ought only to be the subject of arrangement among military men.

Rule absolute for a new trial.

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July 2.

BAXTER v. NICHOLS.

The bankruptcy and certificate of one of several joint grantors of an annuity, and covenantors for payment, discharges the bankrupt, but not his Co-defendants.

THE Defendant, who was a surety, had, with three others, jointly and severally granted by deed, to the Plaintiff, an annuity, and jointly and severally covenanted for the payment, which was further secured by a warrant of attorney, to confess joint and several judgments. A joint judgment upon the covenant had been entered up against the four, and execution had issued, and a levy had been made upon the goods of *Nichols*, for whom *Vaughan* had, on a former day in this term, obtained a rule *nisi*, to set aside the execution, judgment, and warrant of attorney, upon affidavits which stated, that since the grant of the annuity the Defendant *Nichols* had become a bankrupt and obtained his certificate; the consequence of which was conceived to be, that under the stat. 49 G. 3. c. 121. s. 17. the annuity was vacated, and all the securities had become void.

Tens Serjt. on this day shewed cause against this rule. He contended that a surety was not within this clause, which enacts, that it shall be competent to any annuity creditor of any person against whom a commission of bankrupt should issue after the passing of that act, whether the same should be secured by bond, or covenant, or bond and covenant, or by whatever assurance or assurances the same should be secured, and whether there should or should not be, or had been, any arrears of such annuity at or before the time of the bankruptcy, to prove under such commission as a creditor for the value of such annuity, which value the commissioners should have power, and were thereby required, to ascertain; and the certificate of every bankrupt, under whose commission such proof should be, or might have been

been made, should be a discharge of such bankrupt against all demands whatever in respect of such annuity, and the arrears, and future payments thereof, in the same manner as such certificate would discharge the bankrupt with respect to any other debt, proved, or which might have been proved, under the commission. He urged that this clause could not put an end to the suretyship, because, since the covenant was joint, if it had that effect, it must also put an end to the covenant and annuity altogether, and would discharge the principal, as well as the surety, which could never have been intended. Whether in the form of the deed the Defendant appear to be a principal or not, is immaterial; he had sworn he was a surety, and he must stand or fall by his own affidavit. The rule must at all events be discharged, because the Defendant had falsely intitled his affidavit in an action against himself only, whereas the action was against four. The Court cannot hold the annuity void as against this Defendant, without holding it void as to all; for the certificate operates as a satisfaction in respect of this Defendant, and whatever is a satisfaction received from one must operate as a discharge of all the others; the very object and meaning of the clause was to annihilate the annuity altogether in those cases to which it applies, and to commute it into a wholly different thing, viz. a sum of money due from the assignees of the bankrupt. Is the Plaintiff to have this sum of money, and moreover to hold his annuity against all the other grantors? That would be unjust on the other side; but if the annuity is wholly determined by the bankruptcy and certificate of one grantor who joins only as surety, it would be far better to have no sureties for the payment of the annuity. From all these absurdities and hardships consequent upon a different construction, it necessarily followed that this clause

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clause was never designed to extend beyond the original
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Vaughan, in support of his rule, contended that there was no foundation for the distinction, which had been taken between principal and surety: whatever might be the operation of the clause, as it affected the joint judgment, it could not affect the covenant, which was several as well as joint, nor the warrant of attorney, which empowered the Plaintiff to enter up several as well as joint judgments. There was not therefore that supposed hardship attendant on the case which had been artificially suggested, but if there were, the Court ought not to be influenced by the inconvenient consequence of the statute.

MANSFIELD C J. saw no reason why the Plaintiff might not proceed on the joint judgment against the other three, though the fourth was discharged by bankruptcy. The *fieri facias* which was against four, was therefore not to be set aside, except so far as related to this particular man, as to him the rule must be absolute *pro tanto*.

CHAMBER J. The act is very defective, it makes no distinction between principal and surety. It introduces an almost insuperable objection to giving it effect in a court of law in any case of joint grants of annuities; for, by the act, a value is to be put on the whole annuity, and a dividend to be paid on that. Then what is afterwards to be done in a court of law, suppose the Plaintiff wishes to proceed against a solvent grantor for the arrears of the annuity? It would drive the parties into a court of equity; for a court of law has no means to apportion the yearly value. Perhaps a court of equity might put the party to his election, to say
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whether he would proceed and receive the dividend or not, but how can a court of law do that? The clause is very defective, for it does not declare what shall be the consequence of the bankruptcy of a grantor with respect to others; it would have been better if the legislature had declared that: perhaps it might have been as well, if they had given the annuitant the option, either to require from the other solvent persons the residue of the ascertained value, or that the annual payment should thenceforth be reduced in the same rate as the dividend bears to the whole assessed value. The object of this clause was merely to discharge the bankrupt and his future effects, but the rule which is pronounced will not prevent the Plaintiff from proceeding against the other three, as he might otherwise have done.

Rule absolute to set aside the levy.

1811.
BAXTER
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**BORRADAILE and Others, Assignees of READ, a
Bankrupt, v. LOWE.**

July 2.

THIS was an action upon a bill of exchange for 100*l.*, drawn by *G. B. Marsden*, payable to his order, and accepted by *Thomas Cobb*, and indorsed by *Marsden, James Foster, W. R. Anderson, Trevor* and Co., and by the Defendant. Upon the trial before *Mansfield C. J.* at the *London* sittings after last *Easter* term, it appeared that the Defendant, who resided at *Whitechurch, Salop*, had paid the bill in discharge of a debt of 25*l.* 16*s.* due to the bankrupt's estate, to one *Jenkins*, who was employed by the Plaintiffs to collect such debts, and that *Jenkins*

A letter written by the indorser of a bill, who had been applied to for payment, after several days laches, telling the Plaintiff that he would not remit till he received the bill, and desiring the Plaintiff, if he considered the Defendant as unsafe, to return the bill

to *Trevor* and Co. (who were prior indorsers on the bill, and also bankers at the Defendant's place of residence,) was held not to be such a waiver of laches and promise to pay, but that the Defendant, on discovering that, in law, he was discharged, might refuse payment.

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had paid him the difference in cash bills at the time of such payment. The bill became due on the 19th *January* 1811, and was dishonored. On the 25th notice of the dishonor was communicated to the Defendant by the managing clerk of the Plaintiffs in the following letters : *January* 25, 1811. Sir, a bill you paid to Mr. *Thomas Jenkins*, drawn by *G. B. Marsden* on *Thomas Cobb*, due *Jan. 19, (Saturday)* having been dishonored, and noted (1s. 6d.) I request you will make provision for it. I should have apprised you sooner of the circumstance, but Mr. *Jenkins* having quitted our employ, I did not know where to find him. I did write to him in course under cover to Mr. *J. G. Everett Heyterbury*, in whose service he now is. From his receipts I could only trace the bill to a Mr. *Goodwyn Lloyd*, to whom I wrote on *Monday*, and it was his answer this morning that led to the explanation. Signed *J. Wilkins*. To *John Lowe, Whitchurch*. To this letter the Defendant returned the following answer : Sir, I cannot think of remitting till I receive the draft ; therefore if you think proper you may return it to *Trevor and Co., Whitchurch Old Bank*, if you consider me unsafe. Signed *J. Lowe, Whitchurch*, 28 *January* 1811. To Mr. *John Wilkins*. In consequence of this letter the bill was remitted to *Trevor and Co.*, who, after some days, returned it to the Plaintiffs, alleging that they had applied to *Anderfon*, and received it back from him, as out of time ; and that as the delay had arisen with them (the Plaintiffs) they neither considered themselves nor the Defendant liable. At that time the indorsements of *Trevor and Co.* and of the Defendant had been struck out. A question was made at the trial on behalf of the Defendant, whether the Plaintiffs had used due diligence in giving notice to the Defendant of the dishonor of the bill, upon which part of the case however the Plaintiffs did not rely much, but they principally insisted, that whatever laches might be imputable

to them in that respect, the Defendant had waved the want of due notice by his letter of the 28th of *January*, which, as they contended, amounted to a new promise to pay the bill. A verdict was found for the Plaintiff, with liberty to the Defendant to move to enter a nonsuit, which *Shepherd Serjt.* accordingly did, and obtained a rule *nisi* for that purpose on a former day in this term. He adverted to the different consequences resulting from a waver of notice, or a promise to pay after want of notice made by the drawer of a bill of exchange, and where such waver or promise was made by the indorser, the latter of whom must be thereby supposed willing to become liable after all possibility of a remedy over against the prior indorsers is gone, who are all released by the laches; but in the case of the drawer, who can only look to the acceptor, his remedy remains precisely the same as before; for the acceptor is always liable on his acceptance.

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LOWE.

Lens Serjt. now shewed cause, and contended, that coupling the letter of the 25th *January* with Defendant's answer thereto of the 28th, there was a sufficient waver on his part to entitle the Plaintiffs to maintain their verdict. The Plaintiffs in their letter inform the Defendant how it happened that they were not sooner acquainted that he was connected with the bill, viz. that it was owing to the absence of the clerk who received it. Nothing therefore is concealed from the Defendant, who should have made his stand at that time, if he intended to avail himself of the laches; instead of which, he writes an answer in such terms as shew that he had then no such intention; but, that on the contrary, he would pay the amount of the bill, if it were duly remitted to him or *Trevor and Co.* That letter, therefore, may be considered as evidence both of a waver, and a promise to pay; and the cases of *Stevens v. Lynch*, 12 *East*, 38. and *Lundie v. Robertson*,

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son, 7 East, 231., which was an action against an indorser, is an authority to shew, that after having once waved any irregularity, and promised to pay the bill, the Defendant cannot afterwards resume the objection. It was said by *Raymond C. J.* in *Haddock v. Bury, Trin. 3 G. 2. ibid. 326. n.*, if an indorsee has neglected to demand of the drawer in a convenient time, a subsequent promise to pay by the indorser *will cure this laches*. Admitting that the Defendant might be under a misapprehension of the law as to his liability, until the bill was returned to the Plaintiffs by *Trevor and Co.*, yet, as he was apprised of all the circumstances, his ignorance cannot avail him.

Shepherd Serjt., in support of the rule. The question is, whether the Plaintiffs are not bound by law to prove that due notice has been given in respect of this bill. If they are bound, the letters upon which they rely, so far from proving that fact, afford an inference directly contrary: unless the promise to pay contained in the Defendant's letter, which was made only on a supposition that all had been regularly done, must be taken to be an admission to that extent. There is a main difference in point of fact, if not of law, between an indorser and drawer of a bill of exchange, with respect to the consequences of such an admission; as to which, the indorser stands in a situation of much greater detriment. The drawer can at no period look to any other than the acceptor for payment, and to him he may resort at any distance of time; but every indorser has a right to resort to each prior indorser, unless they are discharged from their liability by the want of due notice. If they are once discharged, their liability is gone for ever, and consequently the effect of a waiver, or a promise to pay on the part of any indorser, under such circumstances, is to charge himself after he has been once discharged, and all means of reimbursing himself are at an end with the payment

ment of the bill. There is then no consideration for such a promise; but it is a *nudum pactum*, and will not bind; for there is no moral obligation upon any indorser to pay the bill after he is discharged by the laches of the indorsee, and his remedy over against the other indorsers is thereby gone. In *Lundie v. Robertson*, Lord *Ellenborough* considers the promise as evidence that all things were *rite acta*; but that inference is disproved in this case.

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MANSFIELD C. J. I am extremely glad I saved this point; for my mind fluctuated upon it very much at the trial; but, upon a further consideration, I do not find any case in which an indorser, after having been discharged by the laches of the holder, has been held liable upon his indorsement, except where an express promise to pay the bill has been proved. Now the letter of the Defendant contains no such express promise, but in a great measure shews, that the Defendant was writing under a supposition that he was liable, and that the prior indorsers would pay the bill; for he desires that it may be sent to *Trevor and Co.*, who were the indorsers, next in priority; but when he afterwards finds that the case is otherwise, and that the other indorsers would not pay, and that he also was discharged, he refuses, as it was still open to him to do. I cannot consider the letter as conveying an absolute promise to pay at all events, whether *Trevor and Co.* did or not; and I think, in this case, it would be too much to fix the Defendant by any such implied promise. In most of the cases where the Defendants have been held liable, they have either made an express promise to pay, or a promise when they had a full knowledge at the time that they were discharged, or where there was a real debt binding in conscience, due from them; but none of the cases have gone to the extent of making this Defendant liable; and to hold that

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he was, in this instance, would be extending them beyond their fair import.

Per Curiam,

Rule absolute for a nonsuit. (a)

(a) *Lawrence J.* absent.

July 2.

SHAW, Demandant; LE BLANC, Tenant; RAMSAY and Wife, Vouchers.

Recovery amended by substituting the name of the attorney for the name of the vouchee, which had by mistake been inserted in the place of the attorney's name.

LENS Serjt. obtained permission to amend the warrant of attorney in this recovery by substituting the name of *Robert Shaw*, the attorney, for *Ramsay* the vouchee, who was made to constitute himself his own attorney.

July 2.

GREGORY v. ORMEROD and BANKS.

If a Defendant pleads a justification in trespass, and the Plaintiff, without traversing it, new assigns a trespass, not concerning his title, &c., on which issue is joined, and found for him, the Plaintiff is entitled to no more costs than damages, under 22 & 23 Car. 2. c. 9. s. 136.

TRESPASS for breaking and entering the Plaintiff's dwelling-house and seizing his goods. Both the Defendants pleaded not guilty, and the Defendant *Banks* also pleaded two special justifications under a warrant directed to him as bailiff of the sheriff of *Kent*. Upon a writ of *testatum fieri facias* issued against the goods of the Plaintiff, the replication newly assigned other and different trespasses committed after the return of the said writ of *fieri facias*, and not guilty being pleaded thereto, a verdict was found on the new assignment against the Defendant *Banks*, with 1s. damages, and upon the residue for both the Defendants, and the prothonotary having allowed the Plaintiff the full costs of the trial as against the Defendant *Banks*, and taxed the Defendant *Ormerod* his costs,

Lens

Lens Serjt. on a former day in this term obtained a rule *nisi* for reviewing the taxation, on the ground that the Plaintiff was entitled to no more costs than damages; and if the Court should be of opinion that he was entitled to full costs, then for deducting the costs of the Defendant *Ormerod* from the costs to which the Plaintiff was entitled against the Defendant *Banks*. The latter part of the rule he obtained on the authority of 4 *T. R.* 123. *Mitchel v. Oldfield*, which case however the Court then said was distinguishable, because there the debt and costs allowed to be set off were due from the same Plaintiff to the same Defendant; here, the costs due from the Plaintiff to the Defendant *Ormerod* had no connection with those which might be due from the Defendant *Banks* to the Plaintiff. In the result however it became unnecessary to consider further of that point.

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Shepherd and *Best* Serjts. now opposed the former part of the rule on the authority of *Martin v. Vallance*, 1 *East*, 350. where, in trespass, upon a verdict for the Plaintiff on the new assignment with 1s. damages only, the Court held that he was entitled to full costs notwithstanding there was a verdict for the Defendant on his plea of justification; and the Court said that the rule had been established long ago in *Affir v. Finch*, 2 *Lev.* 234. and acted upon subsequently in many cases; and therefore it was not fit to depart from it: that rule is not at all impeached by the subsequent decision in *Thornton v. Williamson*, 13 *East*, 191. which is clearly distinguishable, for in that case there was judgment by default on the new assignment, and the only question was whether the Plaintiff was right in taking issue on both the Defendant's pleas of justification, on one of which only a verdict was found for him, and on the other for the Defendant; and the Court held that he should not have gone to trial upon that issue which was found against

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him, but should have let judgment go thereon by default, and therefore he was not entitled to the general costs of the trial. †

Lens Serjt. contræ, contended, that the determination in *Martin v. Vallance* was no authority for a similar decision in this case, for there an issue was joined on the Defendant's justification, which took the case out of the operation of the stat. 22 & 23 Car. 2. c. 9. §. 136. because the freehold might have come in question, and there it was said in such case the Plaintiff was entitled to full costs; but here the only issue is upon the new assignment, and there no longer remains any question upon the freehold, but it is reduced to an ordinary action of trespass and a verdict under 40s. In *Cockerill v. Allanson*, *Hullock on Costs*, 86. it was so laid down by Lord Mansfield C. J., who said that nothing in that case was upon the record but a question whether a trespass had or had not been committed.

MANSFIELD C. J. I confess that I am unable to distinguish this case from that of *Cockerill v. Allanson*, in which it was decided that the Plaintiff was not entitled to full costs. In that case a right of way was pleaded by metes and bounds, and there was no issue taken thereon, but the replication new assigned *extra viam*, and upon that there was a verdict under 40s. So in this case there is a justification under a warrant which is not traversed, but there is a new assignment, that the Defendant committed the trespasses at other times, and on other occasions, than are mentioned in the plea, and a verdict is found for the Plaintiff for less than 40s. damages, upon the ground that the officer had continued in possession two days longer than was necessary: but this is totally distinguishable from the case of *Martin v. Vallance*, and it is not wonderful that Buller J. should have expressed dissatis-

dissatisfaction at those cases; for it is a monstrous thing, that when a Plaintiff has been wholly in the wrong in bringing an action, for a trespass, which is fully justified by a right of way, or other right, he therefore shall have full costs, because he brings another action for another little trifling trespass which he may happen to be able to prove. Therefore, the rule ought to be absolute, that the prothonotary shall review his taxation, and shall allow no more costs than damages. We could not however set aside the decision in *Affer v. Finch*, and *Beale v. Moor*, 2 Str. 1168. and all that class of cases, without looking more particularly into them: but without pursuing that inquiry, we are satisfied that the present case is precisely similar to that of *Cockerill v. Allanson*. If the law were otherwise, it would be an encouragement to Plaintiffs to do wrong, and bring vexatious actions.

Rule absolute to review the taxation.

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-, Demandant; BUSSWELL, Tenant;
Vouchee.

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BLOSSET Serjt. moved to amend a recovery by substituting, in all the proceedings, the name of *Busswell* for that of *Carter*, as the tenant to the *precipe*. In this case, the vouchee being in *India*, the usual precaution had been taken for diminishing the chance of the proceedings being vacated by the accident of the tenant to the *precipe* dying before the acknowledgment could be returned from *India* and the recovery completed, by conveying the premises to two, *Carter* and *Busswell*, and their heirs and assigns, *habendum* to them, their heirs and assigns, that in case of the death of one, there might probably be a survivor; and in the deed it was declared that the premises were conveyed, to the intent that they,

The Court refused to alter a recovery by substituting one joint-tenant to the *precipe* for his companion.

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BUSSELL,
Tenant.

or one of them, might become tenant to the *precipe*. *Buswell*, whose name had been inserted in the proceedings, resided in a distant county, which rendered the choice that had been made of him inconvenient, and it was now wished to discharge him and insert the name of *Carter*.

The Court observed, that the two joint-tenants made but one tenant for the freehold, and if only one of the two appeared as tenant, the recovery would be suffered only of a moiety, and

Refused the application.

July 3.

MOLLER v. LIVING.

The bill of lading of a cargo, shipped at *Dantzic* on board a *Prussian*, expressed it to be 100 lasts in 2092 bags. The consignee had purchased it for that quantity, *English* measure, but it did not amount to that quantity by the *Dantzic* measure, which is larger. Held that the master was entitled to freight according to the measure in the bill of lading, and exceeding the freight computed by *Dantzic* measure.

THIS was an action of *assumpsit* for freight. Upon the trial at *Guildhall*, at the Sittings after *Hilary* term 1811, before *Mansfield* C. J., it was proved, that the Plaintiff took on board a cargo of wheat at *Dantzic*, consigned to the Defendant at *London*, and signed bills of lading in the *German* language, whereby he acknowledged to have received from *Simpson* 19 lasts of wheat in 426 bags, 36 lasts of ditto in 739 bags, 22 lasts in 455 bags, and 23 lasts in 472 bags, the four parcels being respectively marked with different marks, which were copied in the bill of lading; to be delivered to the Defendant, he paying freight, 14*l.* sterling per last of wheat taken in, with 10 *per cent.* ordinary arrearage, and 5 *per cent.* *Caplaken*: in the margin was written "100 lasts of wheat in 2092 bags." The bill of lading bore date at *Dantzic*, and the Plaintiff was a *Prussian*. No evidence was given that the corn had been measured at *Dantzic* by either party, but it was in evidence that the *Dantzic* last was a measure of greater capacity (the difference varying from one-twentieth to one-tenth,)

tenth,) than the *English* last, and that the Defendants bought the corn by the latter: the Plaintiff therefore claimed freight for as many lasts as the cargo was believed to amount to in *English* measure, and as¹ were expressed in the bill of lading. The jury found a verdict for 1519*l.* as for the freight, &c. of so many lasts as the cargo would amount to in *Dantzic* lasts, with liberty for the Plaintiff to move to increase the damages to 1610*l.*, the freight of the *English* measure.

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Lens Serjt. having accordingly, in *Easter* term, obtained a rule *nisi* to that effect,

Shepherd and *Vaughan*, Serjts., in this term, shewed cause. This is a *Dantzic* bargain: the ship is freighted, and the corn is shipped at *Dantzic*; the bill of lading is made there, in the vernacular language of that country; it, therefore, is necessarily a contract according to *Dantzic* measure. If, as is urged, the captain has concluded himself by the written instrument bearing his signature, and that is to ascertain the quantity, so far as he is concerned, he would be bound to deliver 100 lasts here, and would be answerable for the deficiency, even though he never received it on board; but the special jury, who are conversant with these subjects, have decided it.

Lens, in support of his rule. The interpretation of written instruments is not within the province of the jury. If it be taken that the corn was measured at *Dantzic*, there is no question about it; but if it be considered as unknown and doubtful what the quantity was, then the parties by consent have assumed it, and concluded themselves from further admeasurement. These 1092 bags are put, and received, on board, as and for 100 lasts; the bill would have expressed it to be *Dantzic* measure, if that had been intended. It would be idle

1811. to infer the number of lasts as 100, unless that were to be at least *prima facie* evidence of the quantity, until the contrary were clearly shewn; of which there is no evidence.

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Cur. adv. vult.

MANSFIELD C. J. now delivered the opinion of the Court.

We are of opinion that we cannot distinguish this contract from the usual case of written contracts, where there is no ambiguity, and that on this contract the captain has agreed to carry, and the freighter has agreed to pay for, the quantity mentioned in the contract, and that is 100 lasts; that they are bound by the words of this bill of lading as they would be by any other written instrument; and that it is irrelevant for them to inquire whether it is *Dantzic* measure or *English* measure; the instrument describes not merely 100 lasts, but 100 lasts very specifically mentioned as contained in so many bags; and I am of opinion that if evidence had been offered, as in truth it was not, for shewing what was the real quantity, it ought not to have been received. Therefore the rule must be

Absolute.

1811.

FULLER v. ABBOTT,

July 3.

ASSUMPSIT, to recover the sum of 105*l.*, being the amount of a deposit paid by the Plaintiff to the auctioneer employed by the Defendant on the sale of a certain ground rent, together with the expenses of investigating the title and preparing the draft of an assignment of the same. The declaration contained two special counts, the first upon an *assumpsit* "that the Defendant "had a good title to the ground-rent put up to sale, and "would perform the conditions of sale;" and the second, "that he had a good title to the rent, and would assign "the same." The Plaintiff alleged, "that he had not a "good title to the rent, nor did nor could he assign it,— "per quod, the Plaintiff lost the benefit of the contract, "and was put to an expence in investigating the title." There were also counts for money had and received, money paid, &c. and a plea of general issue to the whole declaration. Upon the trial of this cause, at the sittings in London, before Mansfield C. J., a verdict was found for the Plaintiff for the deposit and expences, subject to the opinion of the Court upon the following case: By indenture bearing date 25th March 1808, made between the Defendant of the one part, and Joseph Hankin of the other part, it was witnessed, that in consideration of the rent and covenants thereafter reserved and contained, the Defendant did demise to Hankin certain premises therein described, to hold the same, with the appurtenances, unto Hankin, his executors, administrators, and assigns, from the day of the date of that indenture, for the term of 82 years, wanting 20 days; yielding and

Where the Defendant, by indenture made since the passing of the 46 G. 3. c. 65, demised to J. H. certain premises, *reddendum* 40*l.* annually, clear of land-tax, property-tax, &c., and J. H. covenanted to pay the said yearly rent in the manner the same was reserved to be paid as afore-said, and to pay the land-tax, property-tax, &c.

Held that by *f.* 115., coupled with *f.* 195. of the said act, so much of the *reddendum* and covenant as stipulated for payment of the rent clear of deduction on account of property-tax was void, but the residue was good for payment of the rent, subject to such deduction; and therefore the Plaintiff, who had paid a deposit as purchaser of the said rent, was not entitled,

on the above ground of objection, to recover back his deposit from the Defendant, who had engaged to make a good assignment to the said rent.

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paying therefore unto the Defendant, his executors, administrators, or assigns, yearly, during the continuance of the term, the yearly rent of 40*l.*, by quarterly payments, (specifying the days) in each year, *clear* of land-tax, *property-tax*, and all other taxes and deductions whatsoever. And the lessee for himself, his heirs, executors, and administrators, thereby covenanted and agreed with the Defendant, his executors, administrators, and assigns, (amongst other things,) that he the said lessee, his executors, administrators, or assigns, should and would yearly and every year during the term, pay unto the Defendant, his executors, administrators, or assigns, the said yearly rent of 40*l.* on the days and in the manner the same was reserved to be paid as aforesaid, and should and would pay the land-tax, property-tax, and all other taxes, rates, and assessments, then, or which during the said term should be, taxed, or assessed upon, or in respect of, the premises thereby demised, by authority of parliament, or otherwise. The lease contained other covenants on the part of the lessee, with a proviso for re-entry on non-payment of the said rent of 40*l.*, or any part thereof, or breach of any of the covenants: and a covenant on the part of the Defendant for quiet enjoyment on payment of rent and performance of the covenants. The rent reserved by this indenture was, with another ground rent, sold by auction, and was described in the printed particulars as a net ground rent of 40*l.* per annum for a term of 80 years wanting 10 days from *Lady-day* 1810, issuing out of a substantial dwelling-house, &c., describing the premises in the indenture. The following, amongst others, were the conditions of sale, *viz.* that the purchaser of each lot should pay a deposit of 20*l.* per cent., and sign an agreement to pay the remainder in a month, on having an assignment of each lot: and that upon payment of the remainder of the purchase-money, on or before

before the time above limited, the purchasers should have proper assignments at their own expence, and be entitled to the rents and profits of the premises from Lady-day 1810. The Plaintiff was declared the purchaser, and paid the deposit according to the conditions of sale: but afterwards declined to complete the purchase, and claimed by this action a return of the deposit, with charges, on the ground of a defect in the Defendant's title, apparent on the face of the lease itself, in consequence of the stipulation's relative to the property-tax.

S. Shepherd.

Ra. Clayton.

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This case was argued in last *Easter* term by *Shepherd* Serjt. for the Plaintiff, who relied on stat. 46 G. 3. c. 65. which, after providing for the assessment and payment of the landlord's property tax by the occupier of the land, and the allowance of the same by the landlord by way of deduction out of the rent, &c. enacts, *§. 115.* that any person who shall refuse to allow the same shall be liable to a certain penalty; and further, that all contracts, covenants, and agreements, made or entered into, or to be made or entered into, for payment of any interest, rent, or other annual payment aforesaid, in full, without allowing such deduction as aforesaid, shall be utterly void. He admitted it had been decided in *Gaskell v. King*, 11 *Eaft*, 165. that a covenant on the part of the lessee for payment of the property-tax was void by this section of the statute, and yet that a covenant contained in the same lease for payment of the rent clear of all parliamentary, parochial, and other taxes, rates, assessments, and deductions whatsoever, was operative; for the latter covenant was considered as distinct from and independent of the former, and so might well stand, although the former was void; and as to the words, clear of all parliamentary,

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liamentary, parochial, and other taxes, rates, assessments, and deductions whatsoever, it was said, that they should not be intended of such deductions as the law prohibits, but of such only as might be lawfully made: and that, by force of the same reason for which an insurance against all captures, generally, is good, without excepting *British* capture, to which it shall not be deemed to extend; for general words shall be applied only to such reservations as they may lawfully include. So in *Wigg v. Shuttleworth*, 13 *Eng.* 87. there was a separate and substantive covenant for the payment of the principal and interest sought to be recovered, without any reference to that respecting the property-tax, and upon that distinction the judgment proceeded. But in this case there is, 1st, a reservation of the yearly rent of 40*l.* clear of land-tax, *property-tax*, &c., and there is a covenant to pay the said yearly rent in the manner the same was reserved to be paid as aforesaid; so that the covenant expressly refers to the reservation, and adopts it in all its parts, and there is no other distinct and independent covenant either for the payment of the rent absolutely, as in *Wigg v. Shuttleworth*, or coupled with a general clause of exemption from all deductions, as in *Gaskell v. King*, to which the party can resort. Here then is the obvious distinction between this and the cases before mentioned; and the reasoning adopted in those cases does not apply, unless it follows from them, that where a reservation or covenant contains matter which is good in part, and bad in part; that which is bad may be expunged, and the residue be permitted to take effect; the very reverse of which is to be inferred from the distinction on which they proceeded. But even admitting that so much of this covenant as respects the property-tax may be rejected, and that the residue may stand good as a covenant for the payment of 40*l.* annually at the times therein specified, still that would be insufficient; because the Defendant has undertaken to make a good title to a
ground

ground rent, and a rent cannot subsist in covenant alone without a reservation; as in Lord *Dacre's* case, *Dyer*, 275. the lessee covenanted to pay Lord *Dacre* and his wife, their heirs and assigns, during the term, 100*l. per annum* at the usual feasts, &c., and the question was, whether the *Queen*, as guardian to the heir of Lord *Dacre*, should have the rent during the minority; and held that she should not, because it was not a rent reserved, but only a sum in gross, and due to the executors: and though in *Athol v. Hemmings*, 3 *Bull.* 281. it was held that a covenant by the lessee to pay so much rent yearly to the lessor, his heirs, &c. should go with the reversion, so that the assignees of the reversion might sue thereon, yet it appears from the report that there it was expressed in the beginning of the lease, that the lessor did lease the same in consideration of the payment of the rent thereafter mentioned, which was tantamount to a reservation. Now in this case the Plaintiff, as purchaser of a rent, has a right to require such an assignment, as will insure to him all the usual remedies incident to a rent, or in default thereof to recover back his deposit.

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Clayton Serjt. contra, adverted to sect. 195. of the act, which directs that all such deductions (*i. e.* in respect of duties charged upon and paid by the respective occupiers, and chargeable upon the landlord, pursuant to the provisions of sect. 74.) shall be allowed accordingly, notwithstanding such contracts, covenants, and agreements; which sect., he contended, was explanatory of sect. 115.; and the result of them, jointly, was this, that the covenant in this case, *quoad* the payment of the property-tax by the tenant, was void, but in all other respects operative, for no more shall be avoided than is necessary to attain the object of the act, and by such a construction its object in respect of the revenue would be satisfied. This seems to be the principle which governed the decisions

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sions both in *Gaskell v. King*, and *Wigg v. Shuttleworth*, though the Court took the distinction above mentioned; and in conformity with that principle it was held in *Kerrison v. Cole*, 8 *East*, 231. that a bill of sale, by way of mortgage, of certain ships, though void by the register act, might still be valid as a covenant to pay the mortgage money, for that the object of that act was satisfied, by holding it void as a bill of sale. [Lawrence J. The difficulty here is, as the covenant is entire, how that part which is illegal can be rejected, whilst the rest is permitted to stand. Is there any authority to shew that a covenant respecting one thing may be good in part, and bad in part? Mansfield C. J. If the Plaintiff cannot have the net rent of 40*l.* *per annum* for which he contracted, without deduction, how can the Defendant make good his bargain?] The Plaintiff will have all that he can be presumed to have contracted for, *viz.* a net annual rent of 40*l.*, not subject to any deduction created by the act of the party selling, but to such only as the law imposed upon the Plaintiff at the time of the contract made, for which therefore he must be intended to have made account in his purchase. With respect to the objection, that the covenant alone, without the reservation, will be insufficient to constitute a title to the rent, it is obvious that the argument used in support of the covenant, equally applies to the *reddendum* also, which, like every other clause contained in the instrument, must be construed with reference to the existing law at the time when the instrument was framed. Now the law directed, that the property-tax should be allowed by the landlord, notwithstanding any contracts, covenants, and agreements to the contrary; the *reddendum*, therefore, in obedience to that law, though it reserves the rent in full, shall be taken to be subject, nevertheless, to such deductions as the law has created.

Shepherd Serjt., in reply, cited the words of Lord *Ellenborough* C. J. in *Wigg v. Shuttleworth* as in point. His Lordship there said, that the covenant for payment of the property-tax should have appeared distinctly to be so interwoven with the covenant for the payment of the interest, as necessarily to form part of the same covenant: this, he contended, was precisely the case in question, and therefore *Kerrison v. Coles*, and *Mouys v. Leak*, 8 T. R. 411., both which cases were decided on the distinction of the covenants being independent, did not apply. With respect to sect. 195., it was passed only with a view of explaining how far reservations, and covenants for payment of rent free of all rates and taxes, parliamentary, parochial, or otherwise, (which are usual clauses in almost every lease, both before and since the act,) shall be deemed to extend, and was not intended to have the effect now attributed to it, of weakening the provisions of the former clause.

Cur. adv. vult.

On this day *MANSFIELD* C. J. delivered the judgment of the Court. After stating the case, his Lordship said,

This question arises out of two clauses contained in an indenture of demise, dated 25th *March* 1808, whereby the Defendant demised to *Joseph Hankin* certain premises for a term of years, yielding and paying therefore to the Defendant, his executors, &c. a yearly rent of 40*l.* clear of land-tax, property-tax, and all other taxes and deductions whatsoever; and there was a covenant by the lessee to pay to the Defendant the said yearly rent of 40*l.*, on the days and in the manner the same was reserved to be paid as aforesaid, and to pay the land-tax, property-tax, and all other taxes, parliamentary or otherwise, then, or which during the term, should be assessed on the premises. And the question is, whether the Plaintiff, who is the purchaser of the ground-rent reserved by the above indenture,

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indenture, and has paid a deposit upon such purchase, is entitled to a return of the deposit, and the expences incurred of investigating the title, on the ground that the stipulation contained in the *reddendum* and adopted in the covenant, respecting the property-tax, renders both void, so that the Defendant has failed in making good his title to the ground-rent; and that question depends entirely upon the construction that shall be put on sections 115 and 195 of stat. 46 G. 3. c. 65. Now it was determined in *Gaskell v. King*, that where there was a demise at a rent certain, payable clear of all manner of parliamentary, parochial, and other taxes, rates, assessments, and deductions whatsoever, and the lessee covenanted to pay the said rent in manner the same was therein before made payable, and also to pay the land-tax, property-tax, and all manner of other taxes, &c.; that the latter covenant only was void, without affecting the validity of the former, *i. e.* that the lease, in all other respects, except that of the covenant for payment of the property-tax, was effectual. In point of substantial justice, though not perhaps strictly in point of form, the two cases are similar; and upon considering the two sections of the act referred to, we are of opinion that they do not avoid the reservation and covenant contained in this lease for the payment of rent, but only so much of them as stipulates for the payment of the rent in full, without allowing the property-tax. The decision in *Gaskell v. King* certainly proceeded on a distinction which does not exist here, that there was a separate covenant for payment of rent; and perhaps that distinction was founded on a construction extremely refined, *viz.* that the words "clear of all manner of parliamentary, parochial, and other taxes, rates, assessments, and deductions whatsoever," which were embodied in that covenant, were not meant to include, nor even had any reference to, a deduction on account of the property-tax; although, in the very

very next sentence, the lessee had expressly covenanted to bear that, as well as all other charges. But without enquiring further whether that construction was the most natural, it is enough for our decision to advert to the two clauses of the act which have been relied upon in the argument. Now it cannot but be observed, that, although by *f. 115.* it is enacted that all contracts, covenants, and agreements, for payment of any interest, rent, or other annual payment, in full, without allowing such deduction, shall be utterly void; yet that *f. 195.* (which is more to the purpose) enacts that no contract, covenant, or agreement between landlord and tenant, touching the payment of taxes, shall be deemed to extend to the duties charged as aforesaid, nor be binding contrary to the meaning of that act; but that all such deductions and repayments shall be allowed, notwithstanding such contracts, covenants, and agreements: it is clear, therefore, that, although the legislature enacted that all such contracts should be utterly void, it contemplated, nevertheless, that they would still continue in force for the payment of the rent, otherwise the providing for the allowance of the deductions, notwithstanding such contracts, would have been nugatory. We determined the other day (*a*), upon consideration of this act, that a covenant for the payment of an annuity without deduction in respect of the property-tax, was void only *quoad* the deduction, but not in respect of the payment of the annuity; and that case seems to differ from the present in this particular only, that there the deed upon which the question arose, was executed before the passing of the act: but *f. 115.* extends as well to contracts then made, as to those which should be made, and this seem to be an additional reason for the qualified construction which we have given to that clause. Upon the whole, there-

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(a) *Readshaw v. Balders*, *ante*, p. 57.

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fore, we are of opinion, that this reservation and covenant are made void (only *pro tanto*, as far as they contract for payment of the rent clear of deduction in respect of property-tax; but that, subject to such deduction, the contract is still binding, and therefore the Plaintiff cannot object on this ground to the title of the Defendant.

Judgment of nonsuit. (a)

(a) 15 *East*, 440. *Howe v. Synge*.

July 3.

PATERSON v. HARDACRE.

Where a bill has been lost or fraudulently or feloniously obtained from the Defendant, the holder who sues must prove that he came to the bill upon good consideration.

But the Defendant will not be permitted to object to the want of such proof, unless he has given the Plaintiff reasonable previous notice, that the Plaintiff may come to trial prepared to prove his consideration.

THIS was an action upon a bill of exchange, drawn by *Hamilton* on the Defendant, and by him accepted, payable at *Hammersley's*, and indorsed by the drawer, and delivered to the acceptor, who gave it to *Jacobs*, to get discounted, and he gave it for the same purpose to *Williams*, who embezzled either the bill or the proceeds, and refused to give any account of either, and being arrested in trover for the bill, and committed to the Marshalsea prison, he escaped thence, and had not been since heard of. The bill had no indorsements on it subsequent to those which it bore when it was delivered to *Williams*. Upon the trial of this cause, at the *London* Sittings after *Hilary* term 1811, before *Mansfield* C. J., after proof of these facts, the Defendant contended, that the bill having been taken from him either by fraud or felony, it was incumbent on the Plaintiff to shew, that he came to the bill upon good consideration. *Mansfield* C. J., however, thought, the Plaintiff had done enough, in proving the hand-writing of the parties to the bill; and the jury, upon that direction, found a verdict for the Plaintiff.

Best

Best Serjt., in *Easter* term, had obtained a rule nisi to set aside the verdict, and enter a nonsuit; against which,

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Lens Serjt., in the same term shewed cause. He contended that the Plaintiff was entitled to his verdict, having proved all that the ordinary course of establishing a *prima facie* title requires, and that it was not sufficient, in order to rebut his title, that the Defendant should shew that he had parted from the bill without consideration, unless he could also shew that the bill came to the Defendant without consideration, or for an illegal consideration, which was not attempted. The bill was given to *Williams* for the very purpose of being discounted; and it must be taken, that after that object had been attained, *Williams* embezzled the proceeds; but, so far as appears, he parted with the bill for a full value, and for a lawful purpose, and the bill has been ever since legitimately passing from hand to hand for a full and valuable consideration, and is now in the hands of those who ought to hold it. This makes the present case even stronger than that of *Grant v. Vaughan*, 3 Burr. 1516., where, though the holder came to the note upon good consideration, yet the note had, at one period, been lost; or than that of *Miller v. Race*, 1 Burr. 452., for there the bill had been acquired by some one by robbery, previous to its coming to the hands of the Plaintiff. This also distinguishes the present case from that of *Lawson v. Weston*, 4 Esp. N. P. Rep. 56., for there the bill was not in the possession of those who were entitled to the custody of it; and from *Duncan v. Scott*, 1 Campb. 100, for there the making of the bill had been extorted by duress. The Defendant gave no notice that it was his intention to call upon the Plaintiff for proof of the consideration; it was therefore impossible that the Plaintiff should come prepared to prove it; nor did he prove any thing at all

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tending to implicate the holder in the misconduct of *Williams*.

Best Serjt., *contra*, cited the case of *Rees v. Lord Headfort*, 2 *Campb.* 574., where Lord *Ellenborough* held the Plaintiff bound to prove, upon what consideration he came to a bill, which had been obtained by fraud from the drawer. Here *Williams* embezzles, not the money, as is stated, but, so far as appears, the bill itself: he may have in the first instance, taken it with a felonious intent. [*Heath* J. referred to the case of *Rex v. Aickles*, 1 *Leach*, 330., where all the Judges concurred in the propriety of his direction to the jury, to inquire whether the prisoner, who obtained the bill under pretence of discounting it, had done so with a preconcerted design of stealing it; but observed that there was no evidence of a prior felonious intent in *Williams*.] The event proves the previous intent in *Williams* to be the same as in *Aickles*. But even in the simple case of loss, consideration must be shewn by the holder, as in *Lawson v. Weston*. In the cases of *Miller v. Race*, and *Grant v. Vaughan*, there was proof that a valuable consideration had been given by the holder, even in the case of notes payable to bearer; but there is no evidence of any consideration paid by the holder for this bill. If it were in no case necessary to shew consideration, all the banking houses in *London* would be converted into receptacles for stolen bills.

MANSFIELD C. J., in the course of the argument, said, it had been over and over again ruled that consideration must be shewn.

HEATH J. said that the law had been so settled these 150 years.

LAWRENCE J. agreed, and cited *Hinton's case*, 2 *Straw.*
235.

Cur. adv. vult.

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MANSFIELD C. J. now declared the decision of the Court to be, that wherever a Defendant meant to avail himself, as a defence against an action brought upon a bill of exchange, of the circumstance that the bill had been lost, or fraudulently obtained, and that the Plaintiff had no right to the possession thereof, it was necessary that the Defendant should distinctly give notice to the Plaintiff, that he meant to insist at the trial, that the Plaintiff should prove the consideration upon which he received the bill; and no such notice having been given in this case, the

Rule must be discharged.

BARRELL v. TRUSSELL.

July 3.

THIS was an action upon a special agreement. The first count of the declaration stated a bill of sale under seal, whereby *Abbot*, in consideration of 122*l.* 19*s.* 6*d.* to him in hand paid by the Plaintiff, had granted and sold to the Plaintiff certain goods therein particularized, as being in a messuage then in *Abbot's* occupation, to hold the same to the Plaintiff, his executors, &c. without account to *Abbot*, or any other person, so that neither *Abbot*, his executors, &c. nor any other person for him, or in his name, any legal title, interest, or demand, of, in, or to the same, ought to claim at any time thereafter; but from all action, right, claim, &c. should be wholly barred

There must be a good consideration for a promise in writing to pay the debt of another, as well as for any other promise.

A count averring that *J. A.* made a bill of sale of goods to the Plaintiff, in consideration of a debt of 122*l.* 19*s.*, due from *J. A.* to the Plaintiff, and that the Plaintiff being

about to sell the goods in satisfaction of his debt, the Defendant undertook to pay him 122*l.* 19*s.* if he would forbear to sell, does not shew with sufficient distinctness that this is a promise to pay the debt of another, so as to bring the case within the statute of frauds.

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and excluded by that deed, with general warranty; it then averred that the Plaintiff had taken possession, and was about to sell the goods; and in consideration that the Plaintiff, at the Defendant's request, would give up and relinquish possession of, and not sell the goods, the Defendant undertook to pay the Plaintiff 122*l.* 19*s.* 6*d.*, being the amount of two bills of exchange, for 100*l.*, and 22*l.* 19*s.* 6*d.*, drawn by *Abbot* upon *Read*, at three months date, and falling due in *April* then next, (which bills had been given for the consideration of the said bill of sale,) when the same should become payable: that the Plaintiff, in consideration thereof, forbore to sell, but that the Defendant, after the bills became due, refused to pay the Plaintiff the 122*l.* 19*s.* 6*d.*, and the Plaintiff had failed to receive any benefit from his bill of sale. The second count stated, that in consideration that the Plaintiff, at the Defendant's request, would relinquish the possession of certain goods, which had been before then granted and sold to him by *Abbot*, by a bill of sale, made in consideration of 122*l.* 19*s.* 6*d.* due and owing by *Abbot* to the Plaintiff, and which goods he was then about to sell in satisfaction of his debt, the Defendant undertook to pay him 122*l.* 19*s.* 6*d.* in *April* then next. He then averred, that he relinquished possession of, and did not sell the goods, and averred a breach by non-payment in *April*. The third count stated, that in consideration that the Plaintiff, at the Defendant's request, had relinquished possession of certain goods before then sold by *Abbot* to the Plaintiff, by a bill of sale, in consideration of a debt of 122*l.* 19*s.* 6*d.* before then due by *Abbot* to the Plaintiff, and which goods the Plaintiff had been about to sell in satisfaction of his debt, the Plaintiff undertook to pay him 122*l.* 19*s.* 6*d.* on request. Upon the trial of this cause at the *Chelmsford* spring assizes 1811, before *Heath J.*, an auctioneer was examined who had received instructions from the Plaintiff to sell the goods in question,

tion, of which the Plaintiff had taken possession under a bill of sale proved to have been executed, and corresponding with the allegations in the first count; and this witness produced a paper, not stamped, nor signed by the Defendant, but which had in his presence been agreed to by the Defendant, who was the landlord of the house wherein *Abbot* lived, and the goods were; and in which paper it was stipulated, that if the Plaintiff would forbear to sell, the Defendant would pay him in *April* then following the sum of 122*l.* 19*s.* 6*d.* The sale was postponed, but the Defendant being applied to for her signature to the paper, refused to sign it. For the Defendant it was objected, that the Plaintiff could not recover in this action, upon two grounds, first, because this was an undertaking to pay the debt of another, and there was no signature of the party to be charged, which was necessary to satisfy the statute of frauds; secondly, that the terms of the agreement having been reduced to writing, required an agreement stamp to be affixed, before it could be given in evidence. *Heath J.* saved both points, subject to which, the jury found a verdict for the Plaintiff.

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*Shepherd* Serjt. in *Easter* term 1811 accordingly obtained a rule nisi to set aside the verdict and enter a nonsuit; against which

*Best* Serjt. in this term shewed cause. He contended, first, that this was not a contract to pay the debt of another, because such a contract to pay the debt of another, as is within the meaning of the statute, was confined to promises made without consideration. But here was a consideration directly moving to the Defendant from the Plaintiff, in his forbearance to sell the goods at her request. He founded himself upon Lord *Ellenborough's*

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judgment in *Castling v. Aubert*, 2 *East*, 325. The Plaintiff's giving up the possession of the goods, was such a consideration as took the case, as well out of the words, as out of the meaning of the statute. He referred to the cases of *Tomlinson v. Gill*, *Amb.* 330. *Williams v. Leper*, 3 *Burr.* 1886. *Read v. Nash*, 1 *Wilf.* 304. *Holditch v. Mills*, 3 *Esp.* 86.

*Shepherd*, in support of his rule, contended that this case was within the meaning of the statute of frauds. The circumstance of there being a good consideration did not take it out of the statute. The cases which had been held not to come within the statute, were cases where the parties promising had for the consideration of their promise, a benefit which they did not before possess, accruing immediately and directly to themselves by means of that promise. But this is similar to the ordinary case of a promise to pay the debt of a third person made in consideration of the Plaintiff forbearing to sue the debtor, which, as it has often been held, is not such a new consideration as takes the case out of the statute; for the debt from *Abbot* still remained; the Plaintiff's right under the bill of sale still remained; he might sell at any future day, notwithstanding the bills of exchange still remained as before. This forbearance to sell, gave no property, right, or benefit to the Defendant; it is not equivalent to a delivery over of the goods to her, and is therefore distinguishable from *Holditch v. Mills*, in which the party promising made himself the principal, and from *Williams v. Leper*, in which *Leper* acquired a benefit moving to himself. [*Heath J.*] There was a detriment moving to the Plaintiff, which is a good consideration, for in consequence of his forbearance, these goods were afterwards taken and sold under an execution against *Abbot*.]

*The Court* observed, that in all sales, to make any promise valid, whether to pay the debt of another, or to do any thing else, there must be a consideration for it, whether it be in writing or not in writing; to make a promise to pay the debt of another binding, it must be in writing, as well as made upon good consideration. (a)

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*Cur. adv. vult.*

Upon a subsequent day *Mansfield* C. J. inspected the issue, and adverted to the consideration for the bill of sale, therein stated, viz. bills given by the vendor, which he thought rendered the transaction unintelligible. The second count was that which gave the transaction the aspect most nearly approaching to a mortgage, but none of them clearly shewed it.

Upon this day he delivered the opinion of the Court. The bill of sale, as stated in the declaration, is absolute, with no reference to any agreement for redemption: it is to be without any account to be rendered by the purchaser: it ought not therefore to be considered as a pledge, because if it were a pledge, the surplus money, if any were produced by the sale above the 122*l.* 19*s.*, must be returned. But the party in possession of this bill of sale being about to sell, and the bill of sale containing no other reference to any debt of *Abbot* to the Plaintiff, except mention of those bills, nor any thing appearing on the declaration to shew that the Plaintiff is suing on a promise for the debt of another, what is this but the case of a man, who having the absolute uncontrolled power of selling goods, refrains upon the request of another. This is not then a promise to pay the debt of another. It may be, that the Defendant did not go into evidence of the whole case, and that she

(a) *Rann v. Hughes, Dom. Proc. 7 T.R. 350. n.*

might

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might have proved that the bill of sale was intended merely as a mortgage, but the parties have not done that: and therefore the argument on the statute of frauds does not at all arise; for upon this declaration and the imperfect evidence given at the trial, and now before the Court, there is nothing to shew it is an undertaking to pay the debt of another.

Rule discharged.

### PROMOTIONS.

IN this term Mr. Serjt. *Peckwell* received the permission of the Prince Regent to bear the name of *Blosset*, being the name of his maternal grandfather.

In this term died *John Williams* Esq., Serjeant at Law; a gentleman whose deep and extensive learning, laborious research, acute reasoning, sound judgment, and active zeal for the interests of his clients, had deservedly obtained for him a very high reputation in his profession.

END OF TRINITY TERM.

# C A S E S

ARGUED AND DETERMINED

1811.

Courts of COMMON PLEAS,

AND

EXCHEQUER-CHAMBER,

IN

Michaelmas Term,

In the Fifty-second Year of the Reign of GEORGE III.

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PRICE and Others *v.* NOBLE and Another.

Nov. 3.

**A**SSUMPSIT. The declaration stated, that in consideration that the Plaintiffs, at the request of the Defendants, had taken on board of their ship, called the *Brothers*, at *Bahia*, certain goods of the Defendants, to be conveyed in and on board of that ship on a voyage from *Bahia* to *Malta*, the Defendants undertook to contribute and pay their just share in respect of the said goods, of any average loss that might arise or happen to the ship or her tackle, apparel, or furniture, during the voyage; and the Plaintiffs averred that an average loss arose and happened to the said ship, her tackle, apparel,

The owners of a ship's cargo are liable to contribution, for ship's stores necessarily thrown overboard, after a vessel was captured, and while she was in the hands of an enemy.

The accident of an owner having effected an insurance, does not affect his right to recover general average.

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parel, and furniture, at *London*, &c., and that the Defendants share of the said average in respect of the said goods, amounted to 700*l.*, whereof the Defendants had notice. Another count stated, that the Defendants were indebted to the Plaintiffs in 700*l.*, for average, before that time due from the Defendants to the Plaintiffs, for and in respect of certain goods, before that time carried and conveyed in and on board of a certain ship of the Plaintiffs, in a certain other voyage from *Bahia* to *Malta*, at the request of the Defendants, during which voyage a certain general average arose and happened to the Plaintiffs' ship, at *London*. Upon the trial of this cause at *Guildhall*, at the sittings after last *Trinity* term, before *Mansfield* C. J., it was proved that the ship *Brothers*, which was the property of the Plaintiffs, with a cargo of sugar, tobacco, and hides on board, the property of the Defendants, bound from *Bahia* to *Gibraltar* or *Malta*, was, on her voyage, taken by a *French* privateer, which took out of her the captain and crew, except the mate and two of her men, and put on board her a *French* prize-master and part of the privateer's crew, who shaped their course for the port of *Marseilles*; and a storm arising, they threw overboard, for the necessary preservation of the ship, and with the assistance and approbation of the mate, whom they called to their aid in navigating the vessel, the guns, two anchors, two cables, and other stores from the middle deck. On the following day the ship was re-taken by the mate, with the assistance of some *Italians* in the *Frenchman's* service, and was carried into *Gibraltar*. The jury, under the direction of *Mansfield* C. J., found a verdict for the Plaintiffs, subject to the question, whether, under the circumstances, he was entitled to recover.

On this day *Shepherd* Serjt. moved to set aside the verdict and enter a nonsuit, upon the ground that the throwing

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throwing overboard the guns and stores while the vessel was in the enemy's possession, constituted a loss for which the underwriters were liable, but the owners of the cargo were not. As soon as the ship was taken, there was a total loss; upon the re-capture, the underwriters ceased to be liable for a total loss, but continued liable for a partial loss. They were liable for all the diminution of value which happened to the ship while she was in the custody of the enemy, and they being liable to the master, he could not resort to the freighters for contribution. Besides, it was not a damage within the true meaning of a general average. Every person who puts goods on board a ship, tacitly contracts to intrust their safety to the discretion of the master of the ship, and to abide by his judgment of the necessity of sacrificing a part of the ship or cargo for the preservation of the rest, and, in case of such necessity, to contribute accordingly: but the sacrifice in this case made is not dictated by the master and mariners of the ship, but by strangers, to whom the respective owners of ship and cargo have never delegated the like discretion. It is by no means clear, that if the *British* mariners had retained the management of the vessel, these articles would have been thrown overboard; and if goods are thrown overboard by a gross error, and when the sacrifice was wholly unnecessary for any purpose of the ship's preservation, the owner of the sacrificed goods cannot recover contribution, but must seek his remedy against those who occasioned his loss.

MANSFIELD C. J. What has been urged respecting the underwriters can make no difference in the liability of the Defendants. The question, then, merely is, whether a part of the goods being thrown over for the benefit of the proprietors of the residue, the owners of the part that is lost, shall not have contribution against them.

Whatever



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Whatever the law might be in a case where there was any evidence that the goods were grossly and ignorantly thrown over, that is not this case; for, looking on the testimony of the mate, I see, that his expression was, “We met with bad weather, and were obliged to throw these articles overboard. It was necessary to do it. I should not have thrown the stores overboard if I could have got at the cargo. It was necessary to the preserving our lives.” So it seems, that the *French* had so much better an opinion of the judgment of the mate, than of their own, that they consulted him, and intrusted him with the navigation, and the stores seem to have been thrown over by his own individual direction. I think, therefore, that the verdict is right.

HEATH J. The property was not altered by the capture; there was a *spes recuperandi*, and the property still remained in the former owners, as no condemnation had taken place. The law of average and contribution had existed for ages before the practice of insurance was known.

Rule refused.

Nov. 9.

SMITH and Others v. SCOTT.

A loss occasioned by another ship running down the ship insured, through gross negligence, is a loss by perils of the sea.

THIS was an action upon a policy of insurance upon the ships *Helena* and *Merlin*, at and from the bay of *Honduras* to their port or ports of discharge in *Great Britain*, and a loss was averred to have happened to the *Helena* by the circumstance, that while she was proceeding on her voyage, a certain other ship on the high seas, by and through the force of the winds and waves, was carried and sailed against the *Helena*, without any neglect or default of the persons on board the *Helena*, and the *Helena* became lost and stranded by the perils of the seas. Upon the

the trial of the cause, at the *London Sittings* after *Trinity* term 1811, before *Mansfield C. J.*, the evidence was, that a ship named the *Margaret* ran foul of the *Helena* by the grossest neglect; for when, upon the shock being given, some of the *Helena's* crew went on board the *Margaret*, they found only one man on the deck, and he was asleep. Hereupon it was objected by the counsel for the Defendant, that the occasion of the injury was not the perils of the seas, but the gross negligence of the crew of the *Margaret*, and that this was a fatal variance from the loss averred. The jury, however, found a verdict for the Plaintiff, subject to this point, which the Chief Justice reserved.

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Accordingly, *Lens Serjt.*, on this day moved for a rule nisi to set aside the verdict and enter a nonsuit, adding, that the Plaintiff had his remedy against the owners of the *Margaret*.

*MANSFIELD C. J.* I do not know how to make this out not to be a peril of the sea. What drove the *Margaret* against the *Helena*? the sea! What was the cause that the crew of the *Margaret* did not prevent her from running against the other, their gross and culpable negligence? but still the sea did the mischief. It is reasonable enough that the Plaintiffs should permit the Defendant to use their names as Plaintiffs' against the owners or crew of the *Margaret*, so as to recover whatever the Plaintiffs would be entitled to as against the *Margaret*, and to apply it in diminution of their loss; but it would lead to endless discussion, if it were required that no cause except the cause of loss alleged in the declaration should be conducive to the loss.

*HEATH J.* If this doctrine were to prevail, it might go still further, and it might be contended, that if a master

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master conducts his ship so unskillfully as to run it on a rock, that is not a peril of the sea, but a peril of the unskillfulness of the master.

Rule refused.

Nov. 9.

RICHARDSON v. LANGRIDGE.

If an agreement be made, to let premises so long as both parties like, and reserving a compensation, accruing *de die in diem*, and not referable to a year, or any aliquot part of a year, it does not create a holding from year to year, but a tenancy at will, strictly so called.

And though the tenant has expended money on the improvement of the premises, that does not give him a term to hold until he is indemnified.

**TRESPASS** for breaking and entering a stable of the Plaintiff, and breaking to pieces the doors and locks, and tearing down, damaging, and destroying the bins, troughs, and mangers of the Plaintiff, and locking up the stable, and expelling the Defendant from his possession. The Defendant pleaded, first, not guilty; secondly, that *R. Crofsley*, being seised in fee of the premises by indenture demised to the Defendant, among other things, the stable, for a term of 21 years yet unexpired, by virtue whereof the Defendant entered and was possessed, and by reason of such possession justified the acts complained of in the declaration. The Plaintiff confessing the seisin of *Crofsley*, and the lease to the Defendant, replied, that the Defendant afterwards, and during the said term of 21 years, demised to the Plaintiff the said stable with the appurtenances, to hold to the Plaintiff during a certain term, that is to say, for so long a time as they, the Plaintiff and the Defendant, should respectively please, the Plaintiff rendering to the Defendant a certain compensation between them in that behalf agreed upon for the same, by virtue of which demise the Plaintiff entered and was possessed, until the Defendant afterwards and *during the continuance of the said term, and interest* of the Plaintiff therein of his own wrong committed the said several trespasses. The Defendant, apprehending that the demise laid in the plea was descriptive of a holding from year to year, instead of rejoicing that

that he had determined his will, rejoined, that he *did not demise* the said stable to the Plaintiff in manner and form as the Plaintiff had alleged, and tendered issue thereon, in which the Plaintiff joined. Upon the trial of this cause, at the *Maidstone* summer assizes 1811, before Lord *Ellenborough* C. J., the evidence was, that the Defendant having taken a lease of a close of land, and built a shed therein, in *August* 1810 let the same by parol to the Plaintiff, who was a carrier, upon an agreement made without any reference to time, that the Plaintiff should convert it into a stable, and that the Defendant should have all the dung made by the Plaintiff's horses. The Plaintiff, after having for some time occupied it in its original state, laid out about six pounds in putting up a rack and manger, and converting the building to a stable: about the end of the following *April* the Defendant requested him to leave the premises, and upon his refusing to do it till he could suit himself elsewhere, the Defendant, in the Plaintiff's absence, and without having given him any written notice to quit, forced open the door, took down the rack and manger, and carried it out of the stable, and took and used the manure which had been made upon the premises during the Plaintiff's occupation of them, and which was of considerable value. The Defendant's counsel contended, that the evidence proved a strict tenancy at will, (which, though it made good the Defendant's case, the Plaintiff by his replication himself alleged, and the Defendant by his rejoinder denied,) and that therefore the Defendant was entitled at any time to determine his will, and to enter upon the premises and resume the possession when he pleased, without any notice to quit. The counsel for the Plaintiff contended that this must be a yearly holding, or that at all events the Defendant having put the Plaintiff into possession, and suffered him to contract an expence, by erecting a rack and manger, could not countermand the permission at his pleasure; upon the same principle on which, in the case of *Winter*

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v. *Brockwell*, 3 *Esst*, 308., it was held, that a licence once executed, if it be to a thing whereby the party incurs expence, cannot be revoked, unless the grantor tenders to the grantee all the expence which he has incurred in executing the licence. Lord *Ellenborough* C.J. thought that the demise being, so long as each party should respectively please, warranted the Defendant in putting an end to the holding when he pleased, and in evicting the tenant without any notice: whereupon the Plaintiff, either not advert- ing to the terms of his issue, or probably fearing that though he had literally proved his issue, and was en- titled to a verdict thereon, the Defendant would be entitled to judgment *non obstante verdicto*, submitted to a nonsuit.

*Best* Serjt., on this day moved for a rule *nisi* to set aside the nonsuit and have a new trial. He first con- tended that there was at this day no such estate possible in law as a strict tenancy at will; where no longer term was defined, all was tenancy from year to year. At all events the taking of the dung was equivalent to an ac- ceptance of rent; and after an acceptance of rent, a half- year's notice to quit was necessary. *Doe ex dem. Shore v. Porter*, 3 *T. R.* 16. Lord *Kenyon* C. J. says, "The te- nancy from year to year succeeded to the old tenancy at will, which was attended with many inconveniencies. And in order to obviate them the Courts very early raised an im- plied contract for a year, and added that the tenant could not be removed at the end of the year, without receiving six months previous notice." *Right, on the Demise of Cutting, v. Darby*, 1 *T. R.* 163., *Buller* J. "The reason is (of the rule of law, which construes what was formerly a te- nancy at will of lands into a tenancy from year to year,) "that the agreement is a letting for a year at an annual rent: then if the parties consent to go on after that time, it is a letting from year to year." And again, "the

moment the year began, the Defendant had a right to hold to the end of that year; therefore there should have been half a year's notice to quit before the end of the term." He also referred to the case of *Winter v. Brockwell*, and urged that at least, the tenant having erected the rack and manger at a considerable expence, was entitled to a term long enough to indemnify him.

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MANSFIELD C. J. That case has not the slightest resemblance to the present case. You must find some act of parliament, or some decision of the Courts, that two persons cannot agree to make a tenancy at will. But it is a maxim, that *modus et conventio vincunt legem*. Have you any case where the Courts have declared that there must be a tenancy from year to year, the parties having expressly agreed that the holding shall be so long as both parties please? and of that there is evidence here: you say that Lord *Ellenborough* was of opinion that the evidence did not prove a tenancy for a year: the nonsuit then must have proceeded on the ground that there was such an agreement as the Plaintiff has himself stated. Here you speak, all along, of an indefinite agreement. If there were a general letting at a yearly rent; though payable half-yearly, or quarterly, and though nothing were said about the duration of the term, it is an implied letting from year to year. But if two parties agree that the one shall let, and the other shall hold, so long as both parties please, that is a holding at will, and there is nothing to hinder parties from making such an agreement.

HEATH J. I am of the same opinion. It is said that an indefinite hiring of a servant is an hiring for a year, but those cases do not apply. That presumption is founded upon the universal custom of hiring servants at

1811. statute fairs, which is usually for a year (a). There is no custom that if a man lets premises to another he shall let them for a year.

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CHAMBER J. denied the proposition, that at this day there is no such thing as a tenancy at will: the taking of the dung by the landlord gave the tenant no term in the premises. Surely the distinction has been a thousand times taken: a mere general letting is a letting at will: if the lessor accepts yearly rent, or rent measured by any aliquot part of a year, the Courts have said, that is evidence of a taking for a year. That is the old law, and I know not how it has ever come to be changed. The Courts have a great inclination to make every tenancy a holding from year to year, if they can find any foundation for it, but in this case there is none such.

The Court refused the rule.

(a) By stat. 5 Eliz. c. 4. s. 3. "No person shall be retained or hired to work for any less time than a year," in any one of thirty trades therein mentioned; and by s. 7., the persons therein described, being nearly all who are not either independent, or already

employed in trade, are compellable to be retained to serve in husbandry by the year: probably the practice, which is well-founded in physical causes, depending on the revolution of seasons, was current long before this statute.

Nov. 9.

WARING v. BOWLES.

If the attesting witness cannot be found to make affidavit of the execution of a warrant of attorney, the attesting witness must be accounted for by affidavit before the Court will admit secondary evidence.

VAUGHAN Serjt. moved to enter up judgment upon an old warrant of attorney without producing an affidavit made by the attesting witness of the execution thereof, upon an allegation that diligent inquiry had been made for the witness, and that he could not be found.

The Court held that it would be more satisfactory if the Plaintiff's affidavit had described the particular search that had been made for the witness, and where he had been last seen or known to reside, and when he was last heard of, and what endeavours had been made to find him; and for want of such particularity, they for the present

Refused the rule.

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GROTF v. MILNE.

Nov. 11.

**T**ROVER, and after verdict for the Plaintiff, subject to a deduction for certain charges to be ascertained out of court, *Shepherd* Scrjt. in *Trinity* term last obtained a rule nisi to refer it to the prothonotary to ascertain the amount of the freight of the goods for which the action was brought, and that such amount might be deducted from the amount of the verdict. His affidavits stated that *Cassilis* and Co. shipped the cargo, which was consigned to *Robertson* and *Stein*, who were partners of *Paterfon*, from *Palermo*, on board a vessel the sole property of *Paterfon*; *Robertson* and *Stein*, in order to raise money, as well for *Paterfon*'s use as for their own, pledged the cargo to the Plaintiffs, and indorsed the bill of lading to them. *Paterfon* ratified their act. *Paterfon* and Co. afterwards became bankrupts, and *Paterfon* indorsed another bill of lading to the Defendants, who were the sequestrators of his own estate, and the master delivered the cargo to them without paying freight. The verdict comprised the whole value of the cargo without any deduction for freight. *Shepherd* contended that as *Paterfon* would have been entitled to withhold delivery of the cargo, till he had received his freight, and was still entitled to his freight in account as

The owner of a vessel and part-owner of the cargo sanctioning a pledge by his partners of the bills of lading, which were signed for the delivery of the goods on payment of freight, pledges the goods and the freight of them together, unless the freight be expressed to be excepted.



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against *Robertson* and *Stein*, his sequestrators had a right to deduct the amount out of the value of the cargo.

*Blosset* Serjt. in the last term and this, shewed cause against the rule. He agreed, that in trover the Plaintiffs were entitled to recover only the value of the goods, taken in such state as the Defendant had obtained them, and that if they had not been obtained without paying freight, the Defendants would have been entitled to a deduction of the freight as well as of the other charges which they had paid; but that as the Defendants had actually paid no freight, they had no right to that deduction.

*Shepherd, contra.* 'The bill of lading is deliverable to the consignees, he or they paying freight. *Robertson* and *Stein* could not have taken the goods out of the vessel without paying freight, if insisted on. That charge appears on the face of the bill of lading, so that the pawnee had notice, and took it subject thereto. The indorsement purports only to convey to the Plaintiffs the right to the goods subject to payment of freight, and it is a common practice to pledge the goods to one person, and the freight to another.

*Per Curiam.* 'There would be weight in the argument, if the ship had belonged to any other person: but the ship, as well as the cargo, being *Paterfon's* own, the freight was in his power to pledge, and he must be taken to have pledged the freight along with the cargo.

Rule discharged.

1811.

HOGG v. GRAHAM.

Nov. 12.

**SHEPHERD** Serjt. moved that the prothonotary might review his taxation of costs in this case. The action was for goods sold and delivered, and work and labour, against the Defendant as administrator, who pleaded *non assumpsit*, and *plene administravit*. The Plaintiff joined both issues, without adding a prayer for judgment of assets *quando acciderint*. The cause being referred, with the usual stipulation that the costs of the cause should abide the event, the arbitrator awarded a verdict on the first issue for the Plaintiff, and on the second for the Defendant. The prothonotary had taxed costs for the Plaintiff on the first issue, and for the Defendant upon the second. *Shepherd* contended, that the second issue, being a full bar to the whole action, the Defendant was entitled to full costs of the action, deducting only such costs as he had incurred in prosecuting his plea of *non assumpsit*, on which he had failed; but that the Plaintiff was by no means entitled to recover any costs. *Cockson v. Drinkwater*, 2 Tidd. Pr. 967. 5th edit. cited in *Hindley v. Russell*, 12 E. 232. The latter case is distinct from this, because there was a prayer of judgment of assets *quando acciderint*, so that the issue found for the Defendant on the *plene administravit*, was no bar to that action.

Upon the pleas of *non assumpsit* and *plene administravit*, the Plaintiff joined issue, and omitted to pray judgment of assets *quando*. The first issue being found for the Plaintiff, and the second for the Defendant, the Defendant is entitled to the *postea* and general costs.

*Onslow* Serjt. shewed cause in the first instance, against this rule. The Defendant having pleaded *non assumpsit*, the Plaintiff was compelled to go to trial upon that issue, and having succeeded thereon, is entitled to his costs thereof. The plea of *non assumpsit* was wholly unnecessary to the defence, which might have rested with suffi-

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cient security on the complete administration of the funds.

*The Court* compared this to the ordinary case of trespass, where upon not guilty pleaded, and also a justification, if the latter is found for the Defendant, he is entitled to his general costs, and held, that the Defendant in this case was also entitled to the *posse*, and to his general costs.

Rule absolute,

Nov. 13.

GRAY and Another v. LLOYD.

It is illegal to export manufactures, the produce of Europe, from the Cape of Good Hope to any port to the Eastward in his majesty's possession, under 15 Car. 2. c. 7. s. 6. Nor is the operation of that act suspended by the order in council of 12th April 1809 or 1st October 1811.

THIS was an action upon one of several policies of assurance, effected on the 17th of October 1810, at and from the Cape of Good Hope to the island of France, or the island of Rodrigue, and back to the Cape of Good Hope, should the expedition not succeed so as to land her cargo, upon the ship called the *Maria* or *Alexander*, and goods, valued, (so far as regarded this policy,) at 1200*l.*, beginning the adventure upon the goods from the loading thereof on board from the Cape of Good Hope, or where they might be. The Plaintiff averred a loss by hostile capture in the course of the voyage. Upon the trial of this cause at Guildhall, at the sittings after Easter term 1811, before Mansfield C. J., the subscription, interest, loading, and capture, were proved; and a licence from the British governor of the Cape of Good Hope, reciting that the governor deemed it highly expedient that every possible assistance, succour, and comfort should be forthwith afforded to the troops of his majesty and the East India Company there employed on a particular service, and authorizing the schooner *Alexander* to proceed to the islands of Rodrigue and Bourbon, or such of them as might be actually at the time in the possession of the forces

forces aforesaid, with a cargo of spirits, wines, and porter, oilmen's and grocer's stores, hosiery, haberdashery, hats, boots, shoes, clothes, earthen and glass wares; and after delivering the same at the island or islands, to return with a cargo of such articles for colonial consumption as the then *British* government of those islands would permit, and which should not interfere with the articles then already imported or intended to be imported by the *East India* Company. An agent of that Company resident at the *Cape of Good Hope*, by writing on the same instrument, on behalf of the Company, licensed the *Alexander* "to proceed to the *Eastward*, as specified in the above licence," (not expressing any limitation as to the articles to be carried *Eastward*,) and to return with a cargo of coffee, sugar, rum, cotton, or rice, the produce of the island of *Bourbon* or *Rodrigue*, provided the licence of the governor of the island should be had. The cargo shipped was of the description mentioned in the governor's licence, and was of the value of nearly 9000*l.*; but in addition thereto were shipped two cases containing twelve military saddles, and a few dozens of knives and forks, and pewter plates, articles which would be useful to the troops, and which did not together exceed in value 100*l.* But the whole cargo consisted of articles of *British* manufacture which had been previously exported from *England* to the *Cape*. It was objected for the Defendant, that the policy was vacated by the illegality of this adventure, first, because the adventure was not confined to the sort of goods specified in the licence; next, because it was a breach of the monopoly of the *East India* Company; and next, because it was a violation of the navigation act, 15 *Car. 2. c. 7. s. 6*. For the Plaintiff it was contended, that it was legalized by the statute 49 *G. 3. c. 17.* and by his majesty's order in council of the 12th *April* 1809. The jury found a verdict

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verdict for the Plaintiff, subject to liberty reserved to the Defendant to move to enter a nonsuit.

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Accordingly *Lens* Serjt. having in *Trinity* term 1811 obtained a rule *nisi*, the case was twice argued, and

*Shepherd* and *Best* Serjts., first, in the same term, and again in this term, shewed cause against the rule. 'The statute 46 G. 3. c. 30. s. 1. which by 49 G. 3. c. 17. is made co-extensive in duration with the present war, empowers his majesty in council, by any order or orders to be issued from time to time, to give such directions, and make such regulations, touching the trade and commerce to and from the *Cape of Good Hope*, and the territories and dependencies thereof, as to his majesty in council shall appear most expedient and salutary, any thing in the statutes 12 Car. 2. c. 18. and 7 & 8 W. 3. c. 22. or any other act or acts of parliament then in force relating to his majesty's colonies and plantations, or any other act or acts of parliament, law, usage, or custom to the contrary, in any wise notwithstanding. The second section inflicts the penalty of forfeiture of ship and cargo, if any goods shall be imported or exported to or from the *Cape* in any manner contrary to any such orders in council, and provides that nothing therein contained shall in any manner be construed to infringe the rights and privileges of the *East India* Company. But inasmuch as the licence of the authorized agent of the Company for this adventure had been obtained, the present adventure did not, they contended, come within the last-mentioned proviso. In consequence of this act, an order in council was made on the 12th day of *April* 1809, whereby, after reciting that act, "his majesty, in pursuance of the powers thereby given, ordered that it should be lawful, till further order, for all ships and vessels

vessels belonging to the subjects of any country or state in amity with his majesty, to enter into the ports of the said settlement of the *Cape of Good Hope*, and of the territories and dependencies thereof, and to import and export to and from the ports of the said settlement and of the territories and dependencies thereof, any goods, wares, and merchandizes whatsoever, subject to the following exceptions, duties, rights, rules, regulations, and restrictions, viz. that it should and might be lawful for the governor of that settlement, and of the territories or dependencies thereof, for the time being, to impose on all goods, wares, and merchandizes of *Great Britain* or *Ireland* which should be imported into that settlement from any part of his majesty's dominions, after due notice to be given by the governor of the said settlement, as thereafter directed, a duty, not exceeding 15 *per cent.* on the value thereof, such duty to be rated and collected in the same manner as was in use with regard to the import duty then levied at the settlement and the territories and dependencies thereof, from and in ships and vessels belonging to the subjects of countries and states in amity with his majesty, and upon the goods and merchandizes imported in the same. Provided, that the time of the commencement of such duty should be fixed in the proclamation, or other lawful instrument which should be made and issued by the governor for the purpose of imposing such duty, which time should not be less than six months from the day of issuing such proclamation or other lawful instrument: and provided also, that the rate of duty imposed on the importation of goods, not the growth, produce, or manufacture of *Great Britain* or *Ireland*, from any part of his majesty's dominions, when so imported in *British* built vessels, owned and navigated according to law, should in no case be so high as that which should be imposed on the like goods so imported in the vessels of foreign states. And it was his majesty's

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majesty's pleasure, that no goods, wares, or merchandize, the growth, produce, or manufacture of the countries to the *Eastward* of the *Cape of Good Hope*, should be imported into the said settlement, or the territories or dependencies thereof, except by the *East India Company*; and that no such goods, wares, or merchandise should be permitted to be exported from thence, except for sea stores only, or by the same Company, or by their licence. But nothing in that order contained should extend, to prevent ships or vessels employed in the Southern Whale Fishery from carrying on the same, in such and the same manner as might have been done if that order had not been made. And it was also his majesty's pleasure, that no arms or artillery, gunpowder, or ammunition of any sort should be allowed to be imported into the said settlement or the territories or dependencies thereof, except by the *East India Company*, or by licence from his majesty. And further, that the trade and commerce to and from the said settlement, and the territories and dependencies thereof, should be subject to such of the laws of trade and navigation as would have affected the same if that order had not been made, except so far as such laws were contrary to that order." They contended, that the effect of this order was, to legalize equally the importation and exportation of all goods to and from the *Cape*, except *East India* produce. The licence from the governor was wholly unnecessary: his jurisdiction is not to regulate the duties upon the exports, but on the imports to the *Cape*: consequently the small assortment of saddles and cutlery constituted no objection to the Plaintiff's right to recover, for they were not the growth of countries lying to the *Eastward* of the *Cape*. In *Gordon v. Vaughan*, 12 *East*, 302. *n.* the quantity of *British* manufactures exported was merely colourable, and was deemed to be in fraud of the licence; but in the present case the great bulk of the goods were of a legitimate description,

scription, and only a very minute part, if any, was illegal. The statute of 49 G. 3. suspends the operation of 15 Car. 2. c. 7. §. 6. If it were true, as is contended, that the latter statute continues to prohibit the exportation of goods from colony to colony, the former would be nearly inoperative. The licence from the *East India* Company was necessary, not for the outward, but for the return cargo. The object of the voyage was meritorious, for it was to supply his majesty's troops with necessities in the course of their expedition for the reduction of those islands. The order of council institutes a comparison between the duties imposed on *British* goods imported in the ships of states in amity, and the duties on goods not the manufacture of *Great Britain* imported from any part of his majesty's dominions in *British* built ships; and therefore by implication legalizes the importation of *British* manufactures in *British* built ships from other quarters of the king's dominions besides *Great Britain* into the *Cape* and its dependencies. The proviso confirming the navigation laws alludes only to the several requisitions for the built, *British* registration, ownership, and other similar regulations respecting the vessel. The great object of this act and the subsequent order in council, was to facilitate the trade between the *Cape*, which is the great depôt of stores for our troops, and *India*; which object would be wholly defeated by the construction for which the Defendants contend. The order equally legalizes the exportation and importation from and to the *Cape*, of *British* manufactures in *British* vessels: the object was to give the ships of *Great Britain* a privilege which they did not before possess. An order in council, issued since the first argument in this cause, of the 1st of October 1811, recites, "that it was expedient that the trade and commerce to and from the *Cape of Good Hope* and the territories and dependencies thereof, which was at that present time carried

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carried on not only by *British* ships and vessels, but also by ships and vessels belonging to the subjects of any country or state in amity with his majesty, should, from the day thereafter mentioned, be carried on in *British* ships and vessels only; and that the permission that had been granted by an order of his majesty in council of the 12th *April* 1809 for foreign ships and vessels to carry on the said trade and commerce, should cease and determine; and the prince regent in the name and on the behalf of his majesty, and by and with the advice of his majesty's privy council, thereby ordered that every thing in the said order contained which permits ships and vessels belonging to the subjects of any country or state in amity with his majesty to enter into the ports of the settlement of the *Cape of Good Hope*, and of the territories and dependencies thereof, and to carry on trade and traffic with the inhabitants thereof, and to import and export to and from the same any goods, wares, or merchandise whatsoever, should be, and the same was thereby, from and after the 12th day of *April* 1812, revoked and determined: Provided, however, that nothing in that order contained should extend, or be construed to extend, to prevent the entry into the ports of the said settlement of the *Cape of Good Hope*, and of the territories and dependencies thereof, of any ships or vessels belonging to the subjects of any country or state in amity with his majesty, which might resort thither for repairs, or refreshments; in which case a part of the cargoes of such ships and vessels might be permitted to be disposed of for the purpose of defraying the expences of such repairs or refreshment; nor to prevent the entry into the said ports, of any vessels belonging to the subjects of any country or state in amity with his majesty, laden with provisions, and which should be furnished with a licence from the governor of the *Cape of Good Hope* permitting such importation; which licence he was thereby empowered to grant.

grant." This order strongly elucidates the intention of the former order; for if the Defendants' construction should prevail, *British* ships being prohibited by the statute, and foreign ships by the latter order to export goods from the *Cape*, there can be no legal exportation at all from thence. It is wholly discordant with the policy which has always prevailed in this country, of encouraging the navigation of *British* vessels; to grant those privileges to foreign ships, which are denied to our own. No licence, except from the *East India* Company, is now necessary to legalize a cargo of *British* manufactures from *India* to the *Cape*, although it is expressly contrary to the statute 15 *Car.* 2. c. 7. The first order legalizes the trade with the *Cape*, not merely to and from *Great Britain* and *Ireland*, but to and from all parts of the king's dominions in all quarters of the globe.

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*Lens* and *Vaughan*, Serjts., in support of the rule. The statute 49 *G.* 3. c. 17. does not, of itself, take away the operation of the statute 15 *Car.* 2. c. 7. ; it only authorizes the king in council to suspend it; but this he has not done by the order of council of the 12th of *April* 1809, which has no application to the present subject. The statute 15 *Car.* 2. c. 7. f. 6. enacts, " that no commodity of the growth, production, or manufacture of *Europe*, shall be imported into any land, island, plantation, colony, territory, or place to his majesty belonging, or which should thereafter belong unto, or be in the possession of his majesty, his heirs and successors, in *Asia*, *Africa*, or *America*, (*Tangier* only excepted,) but what shall be *bonâ fide* and without fraud, laden and shipped in *England*, *Wales*, or the town of *Berwick-upon-Tweed*, and which shall be carried directly thence to the said lands, islands, &c. and from no other place or places whatsoever, under the penalty of the loss of all such commodities of the growth or manufacture of  
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*Europe*, as shall be imported into them from any other place whatsoever, and of the vessel in which they are imported." In the case of *Toulmin v. Anderson*, ante, 1. 231. This Court observed, that it would be very difficult to get rid of this objection, though they were not then called on to decide it. This is not an order in council authorizing *British* ships to trade, it only purports to authorize the trading of the ships of powers in amity with his majesty; but if it did comprehend the trading by *British* ships, yet, as it expressly confirms, by the saving at the end, all the navigation laws, it does not enable *British* ships to trade, otherwise than as those laws permit; and the saving is not, as it has been supposed, a saving of particular parts of those laws, relating to the built or manning of the ships, but embraces the whole of the laws generally. An inference might be drawn from the words of the statute of the 49 G. 3., which is expressly made paramount to the statutes of 12 Car. 2. c. 18. and 7 & 8 W. & M. c. 32. by name, but omits all mention of this statute 15 Car. 2., the most important of all the navigation acts, that on account of the importance of this act the legislature did not intend to include it in the indiscriminating expression of "any other acts of parliament whatsoever;" but whether or not that be the case, at all events, until the suspending power be called into operation by an order of council directing such suspension, the stat. 15 Car. 2. remains in activity. The only object of the council in issuing the order of the 12th of April 1809 was to make the *Cape* a free port for foreign nations, as it had been while it was in the hands of the *Dutch*: they were not providing for *English* trade. There is but one enactment in the whole order; all the rest is matter of restriction and regulation, engrafted on that enactment; and that enactment extends only to the importation by the ships of countries in amity with his majesty, and, after importing, to the  
exporta-

exportation : but it leaves *British* vessels in the same condition as before. [*Mansfield* C. J. *British* vessels might import before this order.] But by the navigation laws they could not afterwards export, and the order in council expressly confirms all the navigation laws, except such as were thereby expressly repealed, and in fact none such are thereby expressly repealed. The only inference to be drawn from the order in council of the 1st of *October* 1811 is, that the council, discovering that they had granted to foreigners privileges much more ample than their own countrymen enjoyed, determined on the expediency of revoking that indulgence. It is admitted that the clause relating to the *East India* Company, and the exception in favour of the *South* whalers, do not affect the question ; nor is it necessary to enquire whether the terms of the licence issued by the governor of the *Cape* have been complied with ; for the governor had no power to give any such licence. The Defendants do not contend, as has been supposed, that *British* traders are excluded from visiting the *Cape*, but only, that it is not by virtue of this order of 12th *April* that they are admitted ; and although they are admitted to import, it cannot be thence argued, that they have a right to export in contravention of the navigation laws.

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*MANSFIELD* C. J. It is unnecessary to discuss this further : we have repeatedly read this order, and must decide this cause on the same ground as others ; and must say, that this was an illegal voyage, *i. e.* being the voyage of a *British* ship, carrying goods from the *Cape* to the Isle of *Bourbon*, instead of going direct from *Great Britain*. That this is directly contrary to the stat. 15 *Car.* 2. c. 7. ; there can be no doubt, unless this order of council has authorized it. Now upon reading that order, we are compelled to say, it never intended to refer to *British* ships, but only to the ships of foreign nations ; probably

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for the sake of the *Cape*, wishing to give to the inhabitants of that port the advantage of foreign trade; but if that trade was to be carried on in *British* ships, as the order of council contemplates, it must be with a certain proportion of *British* sailors, and observing the other provisions of the act 12 *Car. 2. c. 18.* in that order expressly referred to. Certainly the omission in the statute of 49 *G. 3.* of any express mention of the stat. 15 *Car. 2. c. 7.*, would not prevent its being thereby repealed, as included in the general words of the former act; but the omission to mention it in the act is a strong argument to shew, that the framers of it did not mean to meddle with the trade as then established by law; and the order in council of the 12th *April 1811* does not meddle with it; no argument therefore arises, that the privy council meant to repeal that act. The contrary inference arises from the circumstance that the very order supposes, that all goods which are to come into the *Cape*, are to come in *British* ships, navigated by a crew, three-fourths of which, and the master, are to be *British*, according to the stat. 12 *Car. 2. c. 18.* No weight is due to the inference that because the order in council authorizes foreign ships, therefore, *à fortiori*, *British* ships may come under the like regulation. What is the order? it contains not a word from which it may be inferred that *British* ships are authorized to enter, any otherwise than before; and, if so, we must say that this is a voyage not according to law, but contrary to the navigation act; and it is therefore an objection open for the underwriters to take, if they choose it; though the objection, being a bare legal one, is not to be favoured.

HEATH and CHAMBRE, Js., were both of the same opinion.

Rule absolute.

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## (IN THE EXCHEQUER-CHAMBER.)

JOHNSON *v.* PRESCOTE. In Error.

Nov. 13.

**I**N this case no one appeared for the Plaintiff in error, and the Defendant in error, who appeared by his counsel, had not delivered his paper books, and therefore was not entitled to be heard. The Court felt a strong inclination therefore to punish such gross negligence, by reversing the judgment, but held that they could not do that, without hearing the Plaintiff in error, who did not appear to assign the causes of reversal; they therefore indulged the Defendant in error with permission to deliver his paper books, and to be heard upon the next day for hearing cases in error, upon payment of two guineas costs.

Neglect to deliver paper books in error, punished by payment of costs.

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## (IN THE EXCHEQUER-CHAMBER.)

Nov. 13. GOULD v. HAMMERSLEY and Others. In Error.

After an award of a writ of inquiry of damages, if final judgment be given for a certain sum with the Plaintiff's assent, it is no cause of error, although the record contain no entry of any inquisition executed.

On an interlocutory judgment the Court may assess damages, with the assent of the Plaintiff without the intervention of a jury.

IN this and five other actions on bills of exchange, the Plaintiffs below signed interlocutory judgment by *nihil dicit*, which was followed by an award of a writ of enquiry, returnable on *Wednesday* next after the morrow of the Purification. The same day was given to the Plaintiffs below. The return of the inquisition was omitted, and the record proceeded to state the appearance at that day of the Plaintiffs below, and that because it manifestly appeared to the Court that the Plaintiffs below had sustained damages by occasion of the non-performance of the promises contained in the several counts on the bills to the sum of 10,752*l.* 9*s.* 8*d.*, besides their costs, therefore it was considered that they did recover against the Defendant below their damages aforesaid to 10,752*l.* 9*s.* 8*d.*, and 42*l.* 10*s.* 4*d.* for their costs, by the Court then there adjudged to them with their assent. The Plaintiff in error assigned for error, that by the record it appeared, that it being unknown to the Court below what damages the Defendants in error had sustained by occasion of the non-performance of the several promises and undertakings in the said fifteen first counts first mentioned, it was commanded to the Sheriff of *Middlesex* that by the oath of twelve good and lawful men of his bailiwick he should diligently enquire what damages the Defendants in error had sustained, as well on the occasion of the non-performance of the said several promises in those counts mentioned, as for their costs and charges by them about their suit in that behalf expended, and that he should send the inquisition which he should thereupon take to our lord the king at *Westminster*

*minster* at a day therein mentioned, under his seal and the seals of those by whose oaths he should take that inquisition, together with the writ of our said lord the king to him thereupon directed; but that it did not appear by the record whether the sheriff did send any and what inquisition taken by virtue of that writ, or whether the sum of 10,752*l.* 9*s.* 8*d.*, awarded by the Court to the Defendants in error for the damages which they had sustained by reason of the non-performance of the several premises in the fifteen first counts mentioned, was the amount of the damages found and ascertained by the inquisition, or how otherwise the damages, which were before stated to be unknown to the Court, were found and ascertained.

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*Peake*, for the Plaintiff in error, contended that although, according to the authority of *Holdlipp v. Otway*, 2 *Saund.* 105. the Court may assess damages with the assent of the Plaintiff, yet it was held in the case of *Blackmore v. Fleming*, 7 *Term Rep.* 446. that by the award of a writ of enquiry the Plaintiff had made his election to have his damages ascertained, not by the Court, but by a jury, and could not afterwards retract that election, and have his damages assessed by the Court; otherwise a Plaintiff would, in all cases take the chance of an inquisition, and if the jury found large damages, he would accept them, if they found small ones, he would reject them, and resort to the Court for the chance of obtaining a higher sum.

*Burrough*, for the Defendant in error, contended that there was nothing erroneous in the record. It appeared that at a prior day the Court did not know for what sum they ought to award judgment, and that at a subsequent day they did know what they ought to award. It was not necessary that it should appear by the



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record by what means they had gained that knowledge. If indeed a writ of enquiry had actually issued and been executed, and there had been an omission to state it on the record, the Plaintiff in error might have alleged diminution; but that was not the present case. It must be taken for granted on the record, that nothing had been done in pursuance of the award of the writ of enquiry: this therefore was one of those cases in which the Court might assess the damages without the intervention of a jury. It would be going a great way, to say, that a Plaintiff, who had prayed a writ of enquiry, might not abandon it after it had issued, and before any proceedings were had thereon; but it does not appear by this record that the writ even issued.

*Peake* in reply. It is to be collected from the record that the writ did issue, and it therefore cannot be abandoned.

*The Court* affirmed the judgment.

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Nov. 18.

LEES v. ROGERS.

No person to whom any debt of certain descriptions not exceeding 5*l.* is owing from any person resident within the jurisdiction of the *Birmingham* Court of Requests, can recover any costs, if he sue elsewhere than in that court.

Wheresoever the Plaintiff may reside, and wheresoever the cause of action may accrue.

*SHEPHERD* Serjt. had on a former day obtained a rule nisi permitting the Defendant to enter on the record a suggestion that at the time of the action accrued the Defendant lived in *Birmingham*, which fact, inasmuch as the Plaintiff had recovered at the trial of this cause upon the last summer assizes for *Worcester*, upon the balance of an account for goods sold, only 4*l.* 15*s.*, did, under the several *Birmingham* court of requests acts, deprive the Plaintiff of his costs. The court was erected by the statute 25 *Geo.* 2., which is entitled, "an act for the more easy and speedy recovery of small debts within the town of *Birmingham* and hamlet of *Deritend*

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*Deritend* thereto adjoining, in the county of *Warwick*," and jurisdiction was thereby given over any debt or debts not amounting to the sum of forty shillings, with the exceptions mentioned in a certain clause. And *f.* 24. enacted, that no action or suit for any debt amounting to the sum of 40s., and recoverable by virtue of that act in the court of requests, should be brought against any person or persons in any other court whatsoever. By another act passed 47 *Geo.* 3. *c.* 14. entitled, "an act to alter, amend, and enlarge the powers of" the former act, *f.* 1., after reciting that the former act was passed, which had been found useful and beneficial, but that the same was in some respects defective and insufficient fully to answer the good purposes thereby intended, and that it would greatly tend to the improvement and encouragement of trade, and to the necessary support and protection of useful credit within the said town or parish of *Birmingham* and hamlet of *Deritend*, if the powers of the court of requests constituted by this said recited act were extended to the recovery of small debts not exceeding 5*l.*, and if the number of the commissioners were increased, and the method of electing commissioners altered, and that it would be attended with very beneficial effects to the public, if certain debts, not exceeding the sum of 5*l.*, were recoverable in the said court, it is enacted, that so much and such parts of the said recited act of the 25 *Geo.* 2. as confine or restrain the cognizance or jurisdiction of the court of requests for the said town of *Birmingham* and hamlet of *Deritend* to debts not amounting to 40s., and also such part and parts of the said act as relate to the summoning, appointing, displacing, or removing of commissioners to put the said act in execution, should be repealed. *Seet.* 2. enacted, that the commissioners should and might, and they were thereby authorized and empowered to decide and determine all disputes and differences between party

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and party for any sum not exceeding 5*l.*, in all actions or causes of debt, whether such debt should arise on any promissory note, or inland bill of exchange, or for rent upon leases, articles, minutes, and in all cases of *assumpsit* or *in solum computasset*, and in all causes or actions of trover and conversion, and in all causes or actions of trespass, or detinue, for goods and chattels taken or detained. *Sett.* 12. enacted, that it should and might be lawful to and for any person or persons, (whether such person or persons should reside within the jurisdiction of the court or not, having any debt or debts on the balance of account, or in respect of wages, rent, or arrears of rent, or otherwise howsoever, not exceeding the value of 5*l.*, due or owing to him, her, or them, in his, her, or their own right, or in the right of any other person or persons, or as executor or administrator, guardian, assignee, or trustee, to any person or persons, or due or owing to him as high bailiff, constable, or other officer to any body corporate, as collector of any rates or taxes, or as clerk, or other officer to any commissioners, or to any club, or friendly society, duly associated and constituted by the statutes in that case made and provided, or in any other manner not expressly prohibited by that act, by or from any other person or persons whomsoever, inhabiting, residing, or being within the said town or parish of *Birmingham* and hamlet of *Deritend*, or keeping or using any house, coach-house, wharf, quay, lodging, shop, shed, stall, or stand, or using or frequenting the markets there, or working, or seeking a livelihood, or in any way trading or dealing within the same, to cause such debtor or debtors as aforesaid to be summoned in manner therein mentioned, and upon proof of such summons the commissioners were "empowered and required" to make due enquiry concerning such debts, demands, or plaints, and to make such order or orders, decree or decrees therein, and pass such final judgment and sentence

tence thereon, and award such costs of suit, as to them should seem most agreeable to equity and good conscience. *Sec. 17.* enacted, that if any action or suit should be commenced in any other court than the said court of requests, for any debt not exceeding the sum of 5*l.*, and recoverable by virtue of the said recited act and this act, or either of them, in the said court of requests, then and in every such case the Plaintiff or Plaintiffs in such action or suit should not by reason of a verdict for him, her, or them, or otherwise, have or be entitled to any costs whatever.

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*Lens Serjt.* now shewed cause against this rule. He contended, that it was preposterous to suppose that the legislature intended that Plaintiffs resident in the most remote parts of the kingdom, and whose debts perhaps accrued at their own place of residence, as in the present instance, wherein goods were ordered at *Worcester* and sent to *Birmingham*, should be compelled to follow their debtor to *Birmingham*, and to sue him there in this court of local jurisdiction. It was such a degree of hardship and injustice as could never have been in contemplation. It must be meant either that the cause of action should arise within the jurisdiction, or that the Plaintiff and Defendant should be both resident there; which was not the case here; for the Defendant had pleaded a plea in bar which is given by 25 G. 2. *f.* 11. that the Plaintiff was inhabitant and resident within the jurisdiction of the court, and was liable to be summoned before the court of requests, and the issue on that plea had been found for the Plaintiff.

*Shepherd* supported his rule on the words of the last statute.

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MANSFIELD C. J. The Court cannot enquire whether this enactment be wise or not, but it is impossible to get over the words of the statute.

Rule absolute.

Nov. 19.

POLLERI v. DE SOUZA.

An affidavit to hold to bail must shew on what account the debt became due, and the deponent's addition and place of abode.

MARSHALL Serjt. had on a former day obtained a rule nisi that the bail-bond given in this case might be delivered up to be cancelled upon the Defendant's entering a common appearance, upon the ground of the insufficiency of the affidavit upon which he had been holden to bail, which was made by "James Martin, clerk to John Menzies, and Joseph White of Green-Lettice-Lane, in the city of London, merchants," who swore that Jozè Joaquim de Souza was indebted unto Lorenzo Antonio Polleri of Lisbon, merchant, in the sum of 227*l.* and upwards, as the balance of accounts between the Defendant and the Plaintiff. And the deponent further swore, that no tender or offer had been made to pay the debt, or any part thereof, in or by any note or notes of the Governor and Company of the Bank of England expressed to be payable to bearer on demand. The Defendant was arrested on 21st October on a *capias* returnable on the morrow of All Souls.

Lens Serjt. now shewed cause. He cited *Moulthby v. Richardson*, 2 Burr. 1033. [The Court said, there must be some gross inaccuracy in the report of that case.] The objections were four: 1. That no place of abode of the deponent was sworn to; for which *D'Argent v. Vivant*, 1 East, 330. could be cited. 2. That it was not said he was justly and truly indebted;

debted; on which point *Mansfield* C. J. said, if he is indebted in law, it must be taken he was justly and truly indebted; it was needless to labour that. 3. That it was not said on what account it was due. 4. That the deponent too positively swore there was no tender, who could not know it. The Court thought the rashness of this was no objection to the arrest. But on the third objection, it was principally, that they made the

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Rule absolute.

*Marshall* supported his rule.

STRONG, Demandant; STILL, Tenant; DRAKE,  
 Vouchee.

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UPON the motion of *Lens* Serjt. the Court permitted this recovery to be amended upon payment of the additional king's silver by the insertion of 100 acres of land. It was sworn that *Drake* intended his whole estate should pass, and the entire number of acres in the recovery was greater than the entire number of acres in the estate; but in the recovery there were too many acres of meadow and wood, and too few acres of land.

Recovery amended by inserting more acres of land, there being an excess of acres of wood and meadow, and too few of land.

Rule absolute.

SUNCOX, Demandant; WAKEFORD, Tenant;  
 MARSHALL, Vouchee.

Nov. 19.

SHEPHERD Serjt. moved to amend a recovery by inserting the tithes and tenths arising out of a certain close called *Fisher's* orchard. He stated that *Josiah Marshall*, being seised in fee of *Fisher's* orchard and the residue of the manor of *Tamworth*, and of the tithes and

In applying to amend the recovery, it is not necessary to shew the title to the Court, further back than a seisin in tail of the vouchee.

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tenths of *Fiber's* orchard, devised one undivided third part of all his messuages, farms, lands, tenements, and hereditaments in *Tamworth* to *Josiah Marshall*, the vouchee, in fee tail, who, in the deed to lead the uses, pursued the same description, with the additional description of being devised by the will, and the recovery had also pursued the same terms. The word hereditaments, which carried the tithes in the will and deed, would not pass them in a recovery. The Court at first required the will to be read; but neither will nor probate were in court; and the Court were thereupon disposed to reject the application. But upon referring to the affidavits, *Shepherd* discovered that it was there positively sworn that *Josiah Marshall*, the vouchee, was seised in fee tail of the tithes in question, whereupon, and on reading the operative words of the deed to lead the uses, the Court granted the amendment.

Nov. 19.

SCOTT v. GOULD.

To obtain a distringas it must be sworn the Defendant is believed to keep out of the way to avoid service of process.

**H**ERWOOD Serjt. moved for a distringas upon an affidavit that the officer had called at the Defendant's house and enquired for the Defendant, and that a woman at the house said he was not at home.

The Court held this was insufficient, and that it must be sworn that the officer had attempted to serve the Defendant with the process, and had not been able, and that he believed the Defendant kept out of the way to avoid being served.

Rule refused.

## BATEMAN and Others v. N. PHILLIPS.

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Nov. 19.

**SHEPHERD** Serjt. had on a former day in this term obtained a rule *nisi* requiring the Defendant to produce the original notice or agreement therein mentioned, and set forth in the affidavits, in order that the Plaintiff might have it stamped, or otherwise that the Plaintiff might be at liberty to read a true copy thereof at the trial of the cause, and that the Defendant might in that case be estopped from producing the original. The affidavits upon which this rule was obtained, disclosed the circumstances, which were the foundation of this action, and which were, that on the 22d day of *March* 1810, *Bowling* hearing that the *Milford Bank* was got into discredit with the country, and that a great run had been made upon it on that and the preceding day, suggested to *C. A. Phillips* and *J. Phillips*, the bankers, that if the Defendant would come forward with a large sum in a liberal manner, and support their credit, the public would be satisfied. The Defendant came to the *Milford Bank* on the same day, and seeing that there were several persons in and about the bank, who were holders of *Milford Bank* notes, demanding payment of them, declared to *Bowling* and the several creditors then present, that he would assist the bank with 30,000*l.*, and that he would be responsible for its notes to that amount, and requested all the creditors then present to make it known to such of their neighbours, who might be holders of the notes and creditors of the bank: upon which, *Bowling* proposed to the Defendant, that he, *Bowling*, should have the Defendant's authority in writing to the effect of the above declaration to the creditors then present, as an authority for his using the name of the Defendant to the inhabitants of *Pembroke* and its vicinity, that the Defendant had agreed to support the credit of the *Milford*

The Court will compel the production by a Defendant of an unstamped agreement in his custody, to which the Plaintiffs claim to be parties in interest, upon the instance of the Plaintiffs, in order that they may get it stamped.

Although the Plaintiff be not an instrumentary party.

And although the Plaintiffs' interest no otherwise appears than upon their own declaration, which proves a claim, but not an interest. *Semble*, that the Court would compel a Plaintiff to produce deeds, by attachment.

*Bank*



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BATEMAN

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*Bank* to the extent of 30,000*l.*; and the Defendant agreed thereto; upon which *Bowling* drew out the public notice in question, which expressed that the Defendant did thereby authorize *Bowling* to assure the inhabitants of the town of "*Pembroke* and its vicinity, that he " did thereby undertake to be accountable for the payment of notes issued by the *Milford Bank* as far as the " sum of 30,000*l.* would extend to pay, which would " be an additional security to the public to that amount, " to the estate and effects of *C. A. Phillips* and *J. Phillips* Esquires, the partners in that bank. Signed "*Nathaniel Phillips*," in the presence of two witnesses. This notice or declaration so signed was delivered to *Bowling*, who caused several notices to that effect to be printed, and distributed throughout different parts of the county of *Pembroke*. *Bowling* kept the original notice for several days after, until *J. Phillips*, one of the partners in the *Milford Bank*, and a brother-in-law of the Defendant, came to *Bowling*, and asked him for the notice, as the Defendant wished to have it, which *Bowling* delivered to *J. Phillips*, and the same was afterwards delivered to the Defendant, in whose custody it still continued at the time of the present application.

*Vaughan* and *Pell* Serjts. shewed cause. They objected to the rule on two grounds; first, that this was a motion *prima impressionis*, and that the thing sought for was unreasonable; and secondly, that the Plaintiffs had laid no title before the Court for the claim of this extraordinary indulgence. It did not even appear by the affidavits who the Plaintiffs were, that they were creditors of the bank, or holders of notes, or in any way interested in the instrument in question, or that it could be of any use to them in the present action: it is not suggested that the Defendant improperly possessed himself of this paper: it has not been obtained from the

to

Plaintiffs

Plaintiffs or *Bowling*, who might perhaps be considered as their trustee, since the commencement of the action; if it had, there might be more colour for this application. In a late case in the Court of King's Bench, *Taylor v. Osborne*, the action was brought against the Defendant *Osborne*, as the survivor of three partners, upon bills issued in the name of *Osborne* and Co. Upon the first trial the Plaintiffs were nonsuited by the production of the partnership agreement, which was in the possession of the Defendant, and was not stamped. Upon a second action being brought, *Burrnough* and *Hullock*, for the Plaintiffs, obtained a rule *nisi* that the agreement might be produced and stamped. The Court asked if there were any instance of such an indulgence, the persons applying being no party to the instrument, and refused the application. This case is precisely similar to that, for these Plaintiffs are no parties to the instrument. If they are, their proper application is to a court of equity, where alone can they obtain this indulgence: but if they took the bills after the instrument signed, he has no equity. At least, it ought to appear to the Court by the affidavits, either that the Plaintiffs were induced to take the notes of the bank upon the faith of this guaranty, or that upon that reliance they forbore to sue. In the case of *Cook v. Stocks*, *Tidd Pr.* 5th edit. 486. n., it does not appear that the objection was taken, or that the person there applying was not a party to the instrument, and therefore had an undoubted right to have access to it; and the express refusal of the Court of King's Bench in *Taylor v. Osborne* was of much greater weight on the contrary side. Statutes have been made for the express purpose of compelling the production of ship's articles; 2 G. 2. c. 36. s. 8., and 31 G. 3. c. 39. s. 6., the necessity of a legislative enactment for that purpose is strong evidence of what the law upon that subject was before that statute with respect to ship's articles, and still

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still is with respect to all other instruments, and that such production can only be compelled by the means of a statute. The Court has no jurisdiction to compel the production of any paper in the hands of a Defendant by a rule of this sort. The only mode in which they acquire jurisdiction over a Plaintiff, is, because he has something to ask, and the Court can and does restrain his progress, till he will do what they think just and reasonable; but the only engine by which they extort his consent, is a stay of proceedings, by entering imparlances, *ad infinitum*, till he complies; that mode of compulsion, however, cannot be made applicable to a Defendant. If they possess a direct jurisdiction even over a Plaintiff, why is there no instance to be found of a like rule enforced upon a Plaintiff by the terror of an attachment? The purpose of this rule would also be contrary to the policy of the revenue laws, so far as the object of it is the production of a copy, while the original remains unstamped; for such a practice will discourage the stamping of originals.

*Shepherd, Lens, and Best, Serjts., contra.* The mere purpose of this rule is to get the instrument stamped, that if the Defendant shall produce it at trial, it may be admissible evidence; and that he may not prevent the production in evidence of the copy which the Plaintiff possesses, by producing the unstamped original. Ship's articles and charter-parties not under seal, have often been directed to be produced. The same thing was granted in the case of *Cooke v. Stocks*. This case is very distinguishable from those in which inspection of corporation books has been denied to persons not interested in them; for this is the very contract upon which the action is brought. An application to a court of equity for a discovery, would be nugatory; for the Plaintiff is already possessed of the contents, and copies of this paper, but

has no means of giving them in evidence: if, therefore, the Plaintiff cannot obtain this rule, he is destitute of relief. The instrument being in the custody of a party, a *subpœna duces tecum* cannot be had against him. The Court, and Judges at chambers, have often compelled the production of instruments in the custody of Defendants. It is impossible that the numerous rules which have been made at chambers for similar purposes, can have been all made by consent. In the case of *Taylor v. Osborne* the Court of King's Bench recognized their own jurisdiction, but held that instance unfit to exercise it. This instrument is in an improper custody, for it ought to have continued in the hands of *Bowling* the depositary and trustee of all parties, and he would have been compelled to produce it on his *subpœna*, and the Defendant cannot discharge himself or his trustee from that duty by his own wrongful act. The Plaintiffs are, as it appears by the declaration in the cause, creditors of the *Milford* bank, and therefore parties to this instrument.

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In the course of the argument, *Mansfield C. J.* at first expressed a doubt whether the Court had any jurisdiction to interfere, other than that which they exercised over Plaintiffs through the medium of imparlances; but he afterwards thought it by no means clear that the Court cannot make a peremptory order on a Plaintiff for the production of deeds, and enforce it by way of attachment. If the Plaintiffs took the notes after this notice was given, unless they were after-drawn notes, they had the stronger equity, because they took them upon the faith of that guaranty. *Henth J.* observed, during the argument, that the rule restraining the production of instruments to the application of a party named therein, was much too strict; for suppose a person, though no party to a deed, took an estate by way of remainder, he had nevertheless a strong interest in the deed, and was entitled to compel

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the production. In the case of a copyholder, it was sufficient to enable him to obtain an inspection of the court rolls, that he claims an interest under them; it is not necessary to shew by affidavit that he has an interest. He had often made at chambers orders similar to this which was now prayed.

MANSFIELD C. J. delivered the opinion of the Court.

This is a rule, calling upon the Defendant to produce a certain paper, and it is made on the ground that the Plaintiffs are interested in that paper, and that is the only ground on which they can support their application. On the declaration the Plaintiffs state, that at the time of the giving of the guarantee, they held some notes, and in consequence of it, became possessed of others. They state in their affidavit, that the paper in question was delivered to *Bowling*, who caused several such papers to be printed and affixed in various parts of the county, and that he gave up the original in consequence of an application made by the Defendant. This affidavit is not answered, therefore we must suppose that the instrument is in the possession of the Defendant, since he does not deny it; and the question is, whether the Court have jurisdiction to compel the production of it for this purpose. No doubt, if the Court has such a jurisdiction, it will be extremely convenient for the purposes of justice. In many cases the courts compel production, as of records of corporation books, in cases of *quo warranto*. This paper is certainly not of a public nature, like corporation books or records, but it is a paper in which the Plaintiff is interested. In the case of *Osborne v. Taylor* in the Court of King's Bench, it seems admitted, that if the party had been interested, he might have had the production of the instrument. The Plaintiff in that case was not a party to that agreement, but a perfect stranger, and not interested in it, therefore  
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it was properly refused. But is it possible to say, upon reading this paper, that any man who held any of these notes, or should take them, was not interested? When a man grants by deed poll, no person executes, but the grantor; yet is it to be said that the grantee is not a party? It is impossible to say then, that all the persons who held any of these notes, were not as much parties to the paper, as if they had signed it; therefore, according to the authority of the Court of King's Bench, that part of the rule which requires the Defendant to produce the paper to be stamped, must be made absolute. We should have had a difficulty, (which occurred to the Court,) in granting the other part of the rule, which prays that the Defendant may be restrained from producing the original, and that the Plaintiff may give the copy in evidence, because it is a means of prejudicing the revenue, as it would make it less necessary for persons to put stamps upon their instruments.

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HEATH J. My Lord has gone so fully into the grounds and circumstances of this case, that it is unnecessary for me to repeat them. Certainly the jurisdiction has been frequently exercised, and very much to the advantage of suitors, and the furtherance of justice. A distinction is made by my Brother *Pell* between the application by a Plaintiff and that which is made by a Defendant, and he has relied on the mode used to compel a Plaintiff to produce an instrument of which he has the custody, by permitting the Defendant to enter imparlances, as a proof that the Court has no power over Defendants; but it is every day's practice, where a Defendant gives notice of a set-off, for the Judges at chambers to make an order, that the Defendant shall not be at liberty upon the trial to give evidence upon the set-off, unless he delivers to the Plaintiff a particular

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of the items of set off (a). The remainder-man who takes an estate is not a party to the deed, but should he not have access to the deed upon application?

CHAMBER J. I am of the same opinion. The parties who now make the application are not instrumental parties, but they are parties in interest.

Rule absolute as to such part as prayed that the paper might be produced in order to be stamped, discharged as to the residue.

Mr. Justice LAWRENCE was absent this day in consequence of indisposition.

(a) But *quære* whether a Defendant who gives notice of set off, is not, *pro tanto*, in the nature of an *adversor*? and whether the compulsion is not laid on him in his character of *adversor*, not of Defendant.

Nov. 23.

BRENNAN v. EGAN.

The plea of *non assumpsit* to a declaration in debt may be treated as a nullity.

**B**EST Serjt. had obtained, on the authority of *Coppin v. Carter*, 1 T. R. 462., a rule *nisi* to set aside for irregularity, with costs, a judgment which the Plaintiff had signed for want of a plea, upon the confidence that the plea of *non assumpsit*, which the Defendant had pleaded to a declaration in debt for work and labour, was equivalent to no plea at all.

Clayton Serjt. now shewed cause. There is no distinction in pleading between *nihil dicere* and *insufficienter dicere*. *Yelv.* 38. *Hughes v. Phillips*. *Coppin v. Carter* was distinguishable from this: for there an offence was charged, and not guilty was a relevant issue. *Stafford v. Little*,

v. *Little*, cited in a note to that case, is directly in point for the Plaintiff.

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MANSFIELD C. J. It is an extraordinary thing, that *nil debet* expresses the sense of the general issue in *assumpsit*, much better than *non assumpsit*. For, upon *non assumpsit*, may be given in evidence a release, or payment, or any thing which shews that there was no cause of action at the time of the action brought; although the form of the issue is, that the Defendant did not undertake, whereas the truth may be that he has undertaken and has performed. If we follow precedents, however, we must say this plea is a nullity, and the judgment regular; and therefore I am sorry to say that the rule can be made absolute, only on the terms of the Defendant paying the costs.

Rule absolute on payment of costs.

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CLAYTON v. DILLY.

Nov. 23.

THIS was an action for money paid, and money had and received, which was tried before *Mansfield C. J.* at the *Westminster* sittings after *Trinity* term 1811, when the Plaintiff proved his having paid 105*l.*, and proved the Defendant's hand-writing, authorizing the Plaintiff to bet for the Defendant at *Epsom* races, and proved that he had betted two bets of 50*l.* each on a horse named *Pledge*, and another bet of 5*l.*, admitted to be legal, all of which were lost and paid by the Plaintiff; and he now brought this action to recover from the Defendant the money he had so advanced for him. The jury found

A Plaintiff who by the Defendant's authority lays illegal bets in the Defendant's name, and losing, pays them without a subsequent express direction so to do, cannot recover from the Defendant the amount of the money so paid.



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a verdict for the Plaintiff, subject to the point, on which

*Pell* Serjt. in this term obtained a rule *nisi* for reducing the verdict from 105*l.* to 5*l.*, viz. that the betting-being, by virtue of the statutes 16 *Car.* 2. c. 7. s. 2. and 9 *Ann.* c. 14. s. 6., an illegal transaction, to which the Plaintiff was himself privy and instrumental, and the Defendant having paid the money by the authority of the Plaintiff to the winner, the Plaintiff could not now recover it from the Defendant. [*Lawrence* J. observed, that it had been held that a case was not within that section of the statute of *Ann.* which makes it illegal to bet "on the sides or hands of such as do or shall play as therein aforesaid," unless it were a betting on the sides or hands of persons playing at a game.]

*Lens* Serjt. on a subsequent day in this term shewed cause against this rule. He admitted, in consequence of the decided cases, the illegality of the two bets in question. *Alcinbrook v. Hall*, 2 *Wils.* 309. *Blaxton v. Pye*, *ibid.* *Goodburn v. Marley*, 2 *Str.* 1159. Although, if the matter were now *res integra*, the doctrine of *Barjeau v. Walmesley*, 2 *Str.* 1249., would rather be adhered to. But although the transaction was illegal, and although the Plaintiff had knowledge of it afterwards, and in that sense was privy to it, yet as the Defendant might have exercised all the authority entrusted to him in legal and not in illegal bets, it could not be said that the Plaintiff was a party, or instrumental to the illegality, and therefore he might recover. He referred to the cases of *Faikney v. Reynous and Richardson*, 4 *Burr.* 2069. *Petrie v. Hannay*, 3 *T. R.* 418.

*Pell* Serjt., in support of his rule, observed, that all these authorities had lately undergone full discussion in

the case of *Webb v. Brooke*, ante, 3. 6. The rule has been established by the cases of *Lacause v. White*, 7 T. R. 535., and *Houison v. Hancock*, 8 T. R. 575., that a person cannot render that legal by employing the agency of another, which he could not legally do directly by himself. The Plaintiff comes to ask the Court to assist him, through the medium of another, in the illegal practices of betting and horse-racing. He also referred to the cases of *Havelock v. Rockwood*, 8 T. R. 268. and *Aubert v. Walsh*, ante, 3. 277. [*Chambre*]. referred to *Cotton v. Thurland*, 5 T. R. 405.]

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The Court gave the parties further time to consider the authorities, and on a subsequent day *Heath* J. observed that the following cases were relevant. *Ex parte Mather*, 3 Ves. 373., where Lord *Roslyn*, Chancellor, said, "he had often had occasion to think of those cases on lottery insurances, &c., and it never occurred to him to be possible to state a distinction between them and a case repeatedly adjudged; if a man is employed to buy smuggled goods, if he paid for the goods, and the goods come to the hands of the person who employed him, that person shall not pay for the goods." 13 Ves. 316. *Ex parte Bulmer*. Lord *Erskine*, Chancellor, went largely into the case of *Steers* and *Lashley*, 6 T. R. 61., and all the other cases adjudged in the King's Bench; but in that case, the case *Ex parte Mather* was not cited. And he observes, that *Steers v. Lashley* was decided by Lord *Kenyon* C. J. in the absence of *Grose* and *Lawrence*, Justices.

*Pell* referred to the case of *Ribbans v. Crickett*, 1 Bos. 264.

*Adjournatur.*

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MANSFIELD C. J. on this day delivered the opinion of the Court.

Upon the discussion of this rule, a great many cases were cited, and not all reconcileable to each other; but considering this case, upon the inference to be drawn from all the cases, it is impossible that this action can be supported. In *Petrie v. Hannay*, the Plaintiff succeeded upon the ground of an express order to the man to pay the money, that is, the desire of the testator; and he could not have resisted it. In *Faikney v. Reynous*, there was an order to pay the money, though it was on an illegal contract; and the reasoning of *Buller* and *Grose* Justices, in favour of the Plaintiff, in *Petrie v. Hannay*, would have applied for the Defendant in this case. Here is no order from the Defendant to the Plaintiff to pay the bets that he lost; and though, from the nature of the transaction, it is natural that the Plaintiff should pay for the Defendant any money he lost, yet that arises out of the nature of the transaction itself, which is an illegal transaction, in which the Plaintiff is the principal actor; it is impossible, therefore, to say that the Plaintiff can recover this money, which he has paid in pursuance of this illegal transaction. Therefore the

Rule must be made absolute.

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## HUBBARD v. JACKSON.

Nov. 25.

THE Plaintiff, in the first part of his first count, proceeded in declaring in the usual form upon a policy of insurance, effected by himself on the 5th day of June 1807, at and from *St. Petersburg* to *Chatham, Woolwich, London, Portsmouth, or Plymouth*, all, or either, and including risk in craft, upon goods, in the good ship or vessel called "Ship or Ship," warranted to sail on or before the 20th of *August* 1807, old style, beginning the adventure from the loading thereof on board at *St. Petersburg*, valued at 10,000*l.* on hemp, marked R, valued at 45*l.* per ton, at a premium of four guineas per cent. to return 45*s.* per cent. if the ships should sail with convoy from the *Sound*, on such part as should be discharged in the river; 40*s.* per cent. on such part as might be discharged at *Portsmouth*, and 35*s.* per cent. upon such part as might be discharged at *Plymouth*, and arrive; and after averring the payment of 20 guineas premium, mutual promises, and the Defendant's subscription to the policy for 500*l.*, the Plaintiff alleged that after the making of the policy, the Plaintiff was desirous to withdraw the mark of the hemp, as specified in the policy, and the warranty of failing before or at the time in the policy mentioned, whereof the Defendant had notice, and thereupon, afterwards, on the 6th of *October*, in the same year, by a memorandum indorsed on the policy, and subscribed by the Defendant, by one *P. Selby*, his agent duly authorized, it was agreed by and between the Plaintiff and Defendant, for the consideration of four guineas additional, and allowing 5*s.* per cent. less return than was stated in the policy, to withdraw the mark of the hemp specified in the policy, and the warranty of failing; and the policy was thereby declared to be

A policy was effected at four guineas per cent. on hemp marked R and valued, with certain returns of premium upon arrival at certain ports, and warranted to sail before the 20th of *August*, which was a summer risk and premium. By a memorandum indorsed, the underwriter, for four guineas additional and the return of 5*s.* less for arrival, absolved the assured from the warranty of failing before 20th *August*, so making it a winter risk, and withdrew the mark of the hemp. Held that these were not such alterations of the subject-matter insured, and of the terms of the policy, but that they might be made by stat. 35 G. 3. c. 63. s. 13., without any new stamp.

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be upon the following vessels, viz. the *Sufannah*, *Progress*, *Melantho*, and *Adonis*, that is to say, on hemp to be carried and conveyed by those vessels on the voyage in the policy mentioned, of which the Defendant had notice, and in consideration thereof, and that the Plaintiff had paid him the premium of 20 guineas, being after the rate of four guineas *per cent.* for the assurance of 500*l.* upon the premises in the policy and memorandum mentioned, that is to say, on hemp to be carried by the *Sufannah*, *Progress*, *Melantho*, and *Adonis*, on the voyage in the policy mentioned, and that the Plaintiff had promised the Defendant to perform every thing in the policy mentioned on his part, except as to the mark on the hemp and the warranty of sailing therein mentioned, the Defendant undertook to become an insurer to the Plaintiff for 500*l.* on the premises in the policy and memorandum mentioned, viz. on hemp to be carried by the *Sufannah*, *Progress*, *Melantho*, and *Adonis*, on the voyage on the policy mentioned, valued as aforesaid, and would fulfil all things in the policy on his part contained, as such assured, except that the return of premium in the events in the policy mentioned was to be 5*s.* *per cent.* less than in the policy was mentioned. The Plaintiff then averred, that the ships were in safety at *Peterburgh*, and that hemp to the value of 20,000*l.* was there put on board, viz. 128 bundles of hemp, value 6000*l.*, on board the *Sufannah*; 97 bundles, value 4500*l.*, on board the *Progress*; 157 bundles, value 7000*l.*, on board the *Melantho*; and 89 bundles, value 3000*l.*, on board the *Adonis*; that the Plaintiff was interested to the whole amount; that the ships sailed on the voyage, and that the *Melantho*, *Progress*, and *Adonis*, with their cargoes, were lost by capture, and that the *Sufannah* was afterwards so taken likewise. In the second count, the Plaintiff declared on the policy and memorandum indorsed, as follows: He alleged, that on the 6th of *October* 1807 he

he effected a policy, purporting thereby and containing therein in substance and to the effect following; that the Plaintiff made assurance at and from *St. Petersburg* to *Chatham, Woolwich, London, Portsmouth* or *Plymouth*, all or either, including risk in craft, upon goods by ship or ships, valued at 10,000*l.*, on hemp, valued at 45*l.* per ton, at the premium of eight guineas per cent. to return 40*s.* per cent., if the ships sailed with convoy from the *Sound*, on such part as might be discharged in the river, 35*s.* per cent. on such part as might be discharged at *Portsmouth*, and 30*s.* per cent. upon such part as might be discharged at *Plymouth* and arrive; and that the insurance was by the said policy declared to be on the following vessels, viz. *Sufannah, Progress, Melantho*, and *Adonis*; that is to say, on hemp to be carried by those ships on the voyage in the policy mentioned: he then proceeded with his declaration as in the former policy. There were also the usual money counts.

Upon the trial of this cause, at the sittings in *London* after *Trinity* term 1811, before *Mansfield C. J.*, it appeared, that the policy and the memorandum indorsed thereon were of the dates and to the effect averred in the first count of the declaration, and were respectively subscribed by the Defendant, through his broker, and the respective premiums paid. It appeared in evidence that the *Melantho*, one of the ships upon which the interest was declared, soon after the subscribing of the policy of 5th *June*, arrived in *England* in *August*, with a cargo of hemp belonging to the Plaintiff, but it was not marked *R.*, and had sailed again for another, but that this circumstance was not disclosed to the underwriters at the time they subscribed the indorsed memorandum. The person, however, who shipped the hemp, swore that the hemp which he instructed the Plaintiff to insure was different hemp from that which he shipped on the first voyage. The vessels sailed on the voyage from *Petersburgh* with a cargo

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cargo of hemp, part of which *was* marked R, in November, and were captured. For the Defendant it was contended that the Plaintiff could not recover, because either the policy was originally intended to attach on the second voyage, and if it were, then there was a fatal concealment from the underwriters of a material circumstance, viz. that the *Melantho* had been at home so late in the summer; because that would clearly have shewn that the risk would be a winter risk, for which the underwriters always demanded a higher premium; or, if the policy was originally designed to attach on the cargoes shipped on the first voyage, then the Plaintiff could not recover, because the memorandum indorsed released the warranty of sailing before 20th August, which made it a different adventure; and also because the memorandum was intended to effect a total change of the subject-matter insured, from the cargo which arrived by the preceding trip, to the cargoes which were shipped upon the second voyage; and that change would constitute an entire new policy, for which a new stamp was required, but had not been affixed. They contended that the hemp marked R meant certain specific bundles of hemp, which were not the bundles ultimately shipped. This therefore was not such an alteration of the policy as was permitted, by the statute 35 G. 3. c. 63. s. 13., to take place without a new stamp. The jury found a verdict for the Plaintiff, with liberty for the Defendant to move to enter a nonsuit, upon these grounds.

Accordingly, *Shepherd Serjt.* in this term obtained a rule *nisi* to that effect, upon these grounds, the Court refusing to grant it also on another ground, on which he insisted, that no communication had been made to the underwriters of the arrival of the *Melantho* in England in August from her first voyage, and observing that that point was purely a question for the jury, who were to try

try whether any fraud, or concealment had been practised; and that the jury had thought that inasmuch as the Defendant had, upon signing the memorandum, accepted the winter premium, the ships were at liberty to sail when it was convenient to them.

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*Best and Vaughan*, Sertjs., now shewed cause against this rule. They insisted that this alteration in the policy was legal without a new stamp, being within the stat. 35 G. 3. c. 63. s. 13., and having the three requisites designated by that section, viz. first, the hemp remained the property of the same person, the Plaintiff; 2. the alteration was made before any notice of the determination of the risk; 3. the premium of insurance exceeded 10s. *per cent.* The withdrawing of the mark was only a dispensation with one proof of identity of the goods, to obviate any difficulty upon that head which might arise at the trial: as to the extension of the time of sailing, the very point that no new stamp became necessary on that account, had been decided in the case of *Kensington v. Inglis*, in error, 8 *East*, 273. In the case of *Hill v. Patten*, *ibid.* 373. the change of the policy from "ship and outfit" of a whaler, to "ship and goods," was clearly an alteration of the subject-matter; yet there Lord *Ellenborough* went so far as to intimate, that the shifting of successive cargoes of goods on board the same ship, in the course of the same continued adventure, as in the *African*, and other trades out and home, might properly be considered as one continued subject-matter of insurance, under the term goods; which is a much stronger case than this, where the hemp was identically the same, whether it was marked or not, and howsoever it was marked.

*Shepherd and Lens* Serjts. *contra*. Under the first policy, no recovery could be had for the loss of any hemp but such



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as was marked *R*. Under the second policy, effected by the memorandum, the Plaintiff may recover for the loss of hemp which is not so marked : the second policy, therefore, attaches upon wholly different goods, and is therefore a new policy, and requires a new stamp. In *Hill v. Patten* it was held, that the memorandum indorsed wholly did away the first policy. It is at least an extension, if not a total change of the subject-matter of the insurance, to do away the mark.

*Cur. adv. vult.*

MANSFIELD C. J. now delivered the opinion of the Court.

After recapitulating the first count of the declaration, he observed, that the action was brought to recover the value of the hemp, according to the insurance effected by the Defendant. On the trial some doubt was raised whether this policy was not originally intended to apply to the goods which came on the first voyage ; and it was suggested that the communication made to the underwriters that the Plaintiff wished to withdraw the warranty, without more, might induce them to think, that though something had happened to prevent the ships sailing on the 20th of *August*, the ships still remained in *Russia* ; not that they were here, and were to sail from thence with their original homeward-bound cargo. But those doubts are now removed ; and the only remaining question is, whether the withdrawing the marks on the hemp, be an alteration warranted by the statute 35 *G. 3. c. 63. s. 13.* without a new stamp affixed. And by that act it is extremely clear that no alteration can be made in the subject insured. The 13th sect. speaks of making alteration in the terms and conditions of the policy, but says nothing of making any alteration in the subject insured. It was said by Lord *Ellenborough* in the case cited, that the subject could not be changed ; it would be making quite

quite a new contract between the parties, as, for instance, the substituting wool for hemp. The words of *s. 13.* are, "Provided that the thing insured shall remain the property of the same person." The words are express, and therefore in this case, the question is, whether the alteration of the letter *R* on the hemp, is an alteration of the thing insured. If it is an alteration, the policy is void for want of a new stamp, but if it is not an alteration of the thing insured, it is an alteration in the terms of the policy, warranted by this section, and no new stamp is required, and the verdict is right. It was argued that this alteration must be good, because all the exceptions of being under *10s. per cent.*, out of legal time, &c. were negatived by the evidence. All this is true, but it does not touch the question, whether, this is an alteration of the subject-matter. One does not well understand the meaning of these marks. In a general ship the mark is important to distinguish the property of *A.* from that of *B.*, but here no cause appears for such marks. Here it is in evidence that the Plaintiff has always great quantities of hemp ready to ship: it does not appear that the letter *R* denotes any particular species or quality of hemp, and except for the circumstance of not having the mark alleged in the first policy, the Plaintiff could have recovered on that policy without any alteration. We therefore are of opinion that this alteration is an alteration warranted by the 13th section of that act: at first it struck me that this was not within the meaning of the words, "terms or conditions," this being rather a part of the description of the subject-matter, than a term or condition of the contract. But we think, on the whole, that no new stamp was necessary, and therefore the verdict is right, and the rule must be discharged.

Rule discharged.

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 HUBBARD  
*v.*  
 JACKSON.

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Sir ARTHUR CHICHESTER Bart. v. GEORGE  
CHICHESTER OXENDON, Esq.

A devise of all my estate of *Ashton*, passes a fee-simple, as descriptive of the interest devised, not merely of the situation of the land.

THIS was an action of trespass on the case, in which the Plaintiff declared, that the Defendant was seised of and in a close called *Rye Croft Coppice*, with the appurtenances, at the parish of *Ashton*, in the county of *Devon*, in his demesne as of freehold, the reversion thereof belonging to the Plaintiff; and that the Defendant, contriving to aggrieve the Plaintiff in his reversionary estate and interest in the said close with the appurtenances, whilst the Defendant was so seised thereof, on divers days wrongfully and unjustly felled divers oak trees, then growing in the said close, and took and carried away the same, and converted them to his own use, whereby the Plaintiff had been and was aggrieved and prejudiced in his reversionary estate and interest in the said close. There was also a count in trover for trees. The Defendant pleaded the general issue. This cause came on to be tried at the *Devon* summer assizes 1811, when a verdict was found for the Plaintiff, with nominal damages, subject to the opinion of the Court upon a case, which stated, that the late Sir *John Chichester*, Bart., being seised in fee of the close mentioned in the declaration, with other premises, in the parish of *Ashton*, in the county of *Devon*, on the 3d of *Sept.* 1808, made his will duly executed and attested for passing real estates, in the words following: "I give my estate of *Ashton*, in the county of *Devonshire*, to *George Chichester Oxendon*, second son of Sir *Henry Oxendon*, Bart. of *Broome*, in the county of *Kent*. I give the house in *Seymour Place*, for which I have given a memorandum of agreement to purchase, and which is to be paid for out of timber which I have ordered to be cut down, to the Reverend *John San-*

*ford of Sherwill, in Devonshire. John (L.S.) Chichester.*"  
The devisor died without revoking his will, and the Defendant, who was the devisee named in it, entered into the devised premises, and on the day stated in the declaration, ordered an oak tree to be cut down on the close therein mentioned, which was accordingly done. The Plaintiff was the heir at law of the devisor.

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CHICHESTER  
v.  
OXENDON.

*Pell* Serjt. for the Plaintiff, contended, that the words "my estate of *A/bton*," passed only a life-estate to the Defendant. He admitted that the words "all my estate," and "my estate in," and "my estate at," will respectively pass a fee: but he conceived that my estate of *A/bton* was equivalent to saying my *A/bton* estate, and that if the testator had used the latter expression, it would have been only descriptive of the locality, and not of the interest intended to be devised: he endeavoured to support this position by the doubts which Lord *Hardwicke* had entertained upon a similar point in *Goodwyn v. Goodwyn*, 1 *Ves.* 227.

*The Court* interposed, without hearing *Lens* Serjt., who was to have argued that this devise would pass a fee.

MANSFIELD C. J. I do not think it would have helped the Plaintiff much, if the testator had said "all my *A/bton* estate:" if a case can be found, which is, in words and syllables, the same as this, and contrarily decided, we are bound by it; but if not, I think the case is clear. It fortunately happens that the rule of law in this case coincides with the intention of the testator: to be sure nothing can be stronger than these words.

Judgment for Defendant.

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Nov. 25.

WAINHOUSE v. COWIE.

Every person who ships goods on board a vessel which sails without convoy, does it at his own peril of her having a sufficient licence for the voyage; without which all insurances on his goods are void, by the stat. 43 G. 3. c. 57.

Although the owner of the goods supposed and intended that the ship should have a sufficient licence.

And although he lived at a distance from the port, and had no concern with the management of the ship, or the obtaining for her the necessary documents.

A licence to sail without convoy to a port which a ship must pass on her voyage, is not a sufficient licence to authorize her to run, without licence or convoy, for the residue of her voyage, after she has touched at that port.

A licence to *Gibraltar* will not legalize a voyage to *Palermo*, *Messina*, and *Malta*, touching at *Gibraltar*, and finding there neither licence or convoy.

THIS was an action brought to recover, as for a total loss, sustained by the capture of goods on board the ship *Ocean*, upon a policy effected "at and from *Hull* to *Palermo*, *Messina*, and *Malta*, or *Malta*, *Messina*, and *Palermo*, all or any, with leave to call at *Gibraltar* for all purposes whatsoever, to take in and discharge goods at any ports or places the vessel might touch at, and with leave to trans-ship the goods by any other vessel from *Palermo* to *Messina*, or from *Malta* or *Messina* to *Palermo*, upon the ship *Ocean*;" and the policy was thereby declared to be "upon goods, paying average on each package, as if separately insured, valued at 6665*l.* 4*s.*" Upon the trial of this cause, at the sittings after *Trinity* term 1811, before *Mansfield* C. J. and a special jury, the case appeared to be, that the Plaintiff, who resided at *Halifax*, being desirous to export goods with expedition to *Palermo* on board a running ship, engaged by their agents, *Hall*, *Emmett* and Co. of *Hull*, to ship a quantity of goods from that port on board the *Ocean*, then lying at *Hull*, which *Inghams*, brothers, of *Leeds*, had chartered for the same voyage, and which they intended, and represented by public advertisement, to be an armed running ship, carrying ten guns: and not completely loading her on their own account. *Inghams* had laid her on for freight as a general ship. The Plaintiff accordingly, with a full knowledge that this was a running ship, instructed their correspondents, *N.* and *R. Wainhouse*, in *London*, to effect the insurance in question: at the time of effecting the policy in *London*, on the 10th of *July* 1810, the broker represented to the Defendant and

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the other underwriters that the *Ocean* was a running ship; and the premium, which was six guineas *per cent.*, was the higher on that account. He did not represent to them that the ship would have convoy from *Gibraltar*. The master of the *Ocean*, on the 16th of *July*, at *Hull*, received the Plaintiff's goods on board from their agents there, and on the same day signed to their order bills of lading. The broker of *Inghams* resident at *Hull*, procured from *London*, through the agency of a clerk of the custom-house at *Hull*, and without any communication with the Plaintiff, delivered to the master of the *Ocean*, on the 16th of *July*, together with the ship's clearance for *Malta*, *Messina*, and *Palermo*, a licence to sail without convoy, with ten guns and eleven men, from *Hull* to *Gibraltar*, containing no reference to the voyage insured. It was in evidence that neither *Inghams*, who chartered the vessel, nor the Plaintiff, knew that the licence was a licence to *Gibraltar* only, until after the ship had sailed from *Hull* on her voyage, which she did on the 18th, having on board the complement required of men and guns. On the 25th of *August* she was driven by a gale of wind into *Gibraltar*, where, but for that circumstance, she would not have touched. On her arrival there, the master enquired first for some person authorized to grant him a further licence to proceed on his voyage without convoy; but finding none, he next addressed himself to the officer commanding on board the *Norge*, the senior *British* naval officer commanding on that station, and enquired for convoy to *Malta*, *Messina*, or *Palermo*: that officer informed him that no convoy was then likely to be appointed, and that it was not usual to appoint convoy from *Gibraltar* to those parts of the *Mediterranean*, and recommended him to sail in company with other vessels for mutual protection. He sailed accordingly on the 5th of *September* in company with two other vessels, from which the *Ocean* was separated in a

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fog on the 8th, and was on the 14th captured by a *French* privateer. The Plaintiff's interest was admitted. It was in evidence that no person resident at *Gibraltar* at that time had authority from the lords of the admiralty either to appoint convoy, or to grant licences to sail without convoy. It was further in evidence, that it was the general practice of the lords of the admiralty about that period to appoint convoy to *Gibraltar*, but not for *Palermo* or other places beyond *Gibraltar*; that vessels were sometimes recommended to take convoy from *Gibraltar*; but that was not done here; that so lately as the 22d of *June* a licence had been granted to *Malta*; that there was more hazard in the voyage between *Gibraltar* and *Malta* than between *England* and *Gibraltar*. It was objected, for the Defendant, that the policy was void, inasmuch as the licence obtained did not extend to the voyage insured, and that the vessel therefore failed without licence on the voyage insured. By the stat. 43 G. 3. c. 57. s. 1., "It shall not be lawful for any vessel belonging to any of his majesty's subjects, (except as thereafter is provided,) to depart from any port or place whatever, unless under the convoy and protection of such ship or ships as shall or may be appointed for that purpose." And by s. 4., "In case any vessel shall depart without convoy, or shall afterwards desert or wilfully separate or depart from such convoy contrary to the provisions of that act, every policy of insurance, upon such vessel, or upon any goods, laden or to be laden on board thereof, or upon any property, freight, or other interest, arising out of the same, whereon insurances may lawfully be made, (and which shall be the property of the master or other person having the charge or command of such vessel so sailing without convoy, or wilfully quitting the same, or of any person interested in such ship or vessel, or cargo, who shall have directed, or have been any way privy to, or instrumental in causing such ship

or vessel to sail without convoy, or wilfully separating therefrom,) shall be null and void to all intents and purposes; and further, if any party to such insurance, his, her, or their executors or administrators, any broker, agent, or other person shall knowingly make or effect or procure to be made or effected, or shall negotiate or transact any settlement upon such insurance, or pay or allow in account, or agree to pay or allow in account or otherwise, any sum or sums of money upon any loss, peril, or contingency relative to any such insurance, every such person shall for every such offence forfeit the sum of 200*l*." But by sect. 6. "Nothing in that act contained, whereby vessels are required not to sail or depart without convoy, shall extend to any vessel for which a licence shall be granted to sail or depart without convoy, either by the lord high admiral of *Great Britain*, or by the commissioners for executing the office of lord high admiral, or any three or more of them, or by such person or persons as shall be duly authorized by him or them, or any three or more of them, for that purpose." The 8th section provides, that "the act shall not extend to any vessel sailing or departing without convoy from any foreign port or place, in case there shall not be any convoy appointed for such ships or vessels, nor any person at such foreign port or place, duly authorized by the lord high admiral of *Great Britain*, or the commissioners for executing the office of lord high admiral for the time being, or any three or more of them, to appoint convoys for such vessels, or to grant licences for such vessels to sail or depart without convoy." [*Mansfield C.J.* thought that as the Plaintiffs knew that the vessel was to sail without convoy, it was incumbent on them to see that a sufficient licence for the voyage was procured, and that the licence proved was not sufficient; but reserved both points; first, whether the Plaintiffs were privy to the sailing without convoy within the meaning of the act;

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and, secondly, whether the licence obtained was a sufficient licence for the voyage: subject whereunto the jury found a verdict for the Plaintiff, expressing their opinion that it was the constant course of trade that the charterer or master of the vessel, and not the owner of the goods, should procure the licence.

*Shepherd* Serjt. having accordingly in this term obtained a rule *nisi* for a new trial,

*Best* and *Vaughan* Serjts. shewed cause. Having observed that a very large sum was depending on this question, and that the defence was unconscientious, inasmuch as the underwriters subscribed the policy, with a full knowledge that the ship was to sail without convoy, and the Plaintiffs knew no more, they insisted that this policy was not avoided by the convoy act. Even upon the 4th section, the policy is not void, for all the words of the section must be taken together, and then it will not suffice that the Plaintiff is merely conscious of the fact of the vessel sailing without convoy. The species of privity mentioned in the act, is such a degree of privity as makes him instrumental to the sailing without convoy. This Plaintiff residing at *Halifax*, at a considerable distance from the port of *Hull*, not interfering, or entitled to interfere with the management of the ship, is in no degree instrumental to the sailing without convoy. But further, as all acts *in pari materia* may be called in aid to explain each other, so, *a fortiori*, the several clauses of the same act must be construed together, and it must be seen what was the whole intention of the legislature: and the 6th section, coupled with the 4th, so qualifies it, that the offence created by the act is not merely the sailing without convoy, but the sailing without convoy "contrary to the provisions of the act;" to find what that is, all the sections must be incorporated; and the result

result is, that by the words of the 4th section, the procuring the vessel to sail without either licence or convoy, constitutes the offence, and the policy is avoided only in the case where the ship sails without either licence or convoy, with the Plaintiff's express assent. In this case it is particularly to be observed, that the *Ocean* was a general ship, and if it were incumbent on the owner of every parcel of goods sent by a general ship, to procure a licence for the ship, there would be as many licences necessary as there are consignors. [*Mansfield* C. J. Every consignor is interested to see that one proper licence for the ship is obtained.] It is true that the convoy required by the act must be convoy for the voyage, and that the licence required by the act must be a licence for the voyage; but inasmuch as it has been determined that it is sufficient to sail under the protection of convoy appointed for so much of the voyage for which government think it sufficient to appoint convoy, so is it sufficient to sail with a licence for so much of the voyage for which licences are usually granted. The licence is in lieu of convoy, and the necessity of the licence is only co-extensive with the ordinary appointment of convoy; if it were otherwise, the sphere of *British* commerce, instead of comprehending the whole navigable globe, must be confined to those seas, to which we can spare ships of war, to act as convoy. It was in evidence that no licence could be procured to any point on the voyage beyond *Gibraltar*, and the Plaintiff's had sufficiently complied with the statute in obtaining a licence to the furthest point to which a licence could be procured. And this would be a sufficient title for the Plaintiff, even if he were master of the ship; but the case of the owner of goods is very different from that of the master. For it was in evidence, that in the ordinary course of trade, it is not the business of the owner of the goods, but of the master of the ship, to procure the licence; it is there-

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fore no fault in the owner of the goods that the vessel sails without a proper licence. The Defendant must at least prove a previous knowledge in the Plaintiff of the ship's sailing without a sufficient licence, as well as without convoy; but so far from that being proved, it was in evidence that the Plaintiff understood a licence was to be obtained, and intended it should be obtained, but that he was ignorant what sort of a licence had been procured, nor did he ever know the contents of it, until after the ship failed: if he had himself obtained a defective licence, it might have been said that he was instrumental to the offence. It is said that he was constant that this was a running ship. Undoubtedly he was so; but the Court cannot intend that the Plaintiff designed to act illegally, unless there be evidence of it; nor was the Plaintiff at liberty to intend that the master or charterer of the vessel would act illegally; he contemplated, and had a right to contemplate, that she was a running ship legally to be licensed for the voyage, and to presume that the charterers or the master would procure a legal and sufficient licence in the course of their business. It is impossible to say that mere ignorance of a fact, which it was not the Plaintiff's duty to enquire into, shall not only subject him to the loss of all his property, but shall subject both himself and the broker to immense penalties, and the Defendants themselves to a penalty of 200*l.* each, which is a necessary consequence inseparable from the other. But it cannot be that one man should be rendered a criminal, because another is ignorant of facts. [*Mansfield* C. J. The knowledge has no relation to the sailing without licence: the knowledge mentioned in the act is the knowledge of the ship's sailing without convoy.] Moreover, this case does not come within the act, by reason of the eighth section; for the port from which this vessel sailed without having either convoy or licence, was *Gibraltar*, a port at which, by the

the policy, she had liberty to touch, and at which there was neither any convoy appointed, nor any person resident, authorized by the lords of the admiralty to appoint convoy or grant licences. [*Heath* J. intimated that *Gibraltar* was not a foreign port for the purposes of this act.] Either therefore the licence obtained, was sufficient, or the evidence fails to connect the Plaintiff with the illegality of the vessel's sailing contrary to the provisions of the act.

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*Shepherd* Serjt., *contrd.* First, it is clear the licence obtained was insufficient. The object of the convoy act was equally to protect the underwriters as the merchants, for it was designed to protect the property of the country from falling into an enemy's hands. The policy of the act is, that it shall be rendered generally illegal to sail without convoy; but a dispensing power is reserved to the government, who, having the best intelligence, may be supposed to be the best judges of the propriety of letting ships have a licence to sail without convoy, upon receiving particular information of their respective strength and destination, and weighing those circumstances against the probable dangers of the voyage. It will not be contended that if the government had determined to grant no licence at all, the ship might have sailed without either licence or convoy; why then may she sail for *Palermo*, without convoy, when the government, in their discretion, think it wise not to licence her to proceed without convoy further than *Gibraltar*? If a ship obtaining a licence for a small part of her voyage, may afterwards extend her course to any point she pleases, it will be only necessary in future to obtain a licence for some short distance, and every merchant will be at liberty to run the rest of the voyage without convoy as he may think fit. It is expressly proved that the master did not intentionally put  
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into *Gibraltar*, nor ever cleared out for that place; so that she never failed on the voyage licenced; and the fact which has been insisted on as affording an argument for the Plaintiff, that the government refused at that time to grant licences to *Palermo*, affords the strongest argument for the Defendant; their reason evidently being, that they did not find it convenient to appoint convoy for a season: the navigation of the *Mediterranean* was so much more infested by the enemy than that on this side of *Gibraltar*, that the government deemed it expedient to let the law take its course, and to prohibit the navigation of those seas altogether. The case of the owner of goods may be admitted to be distinguishable from the case of the owner of the ship, if the master barratrously or fraudulently sails without convoy, or if having sailed with convoy, he barratrously, tortiously, or improperly leaves the convoy: neither the owner of the ship nor the owner of the goods should be prejudiced thereby; but here the owner of the goods knowingly puts his goods on board a ship which he knows is to sail without convoy, and which he intends should sail without convoy: he knows therefore that he embarks in that which is an illegal act, unless he can bring himself within the dispensation. It is therefore a duty incumbent on him to enquire of the master whether he has procured a sufficient licence; if a sufficient licence is shewn, and the master afterwards tortiously departs in contravention thereof, the owner of the goods might not be subjected by that fraud to the penalties of the act; but that is not the case here. A person who agrees to put his goods on board a vessel as a running ship, is surely instrumental to her sailing without convoy. It would even have been a breach of contract in the master if he had waited for convoy. The ships sailing without convoy was not a sailing without convoy from *Gibraltar*, a foreign port which alone is excepted

in the case where no convoy is appointed, but it was a sailing from *Hull*, a *British* port. If, indeed, the Plaintiff could evince that convoy means convoy only to leave the port he is in, he might have some colour to contend that a licence to leave the port he was in, would be licence for the voyage; but upon the decided cases there is no colour for the argument.

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*Lens* Serjt., who was to have argued on the same side, was stopped by the Court.

MANSFIELD C. J. This question lies in a narrow compass. This is an action brought to recover a loss sustained by the capture of a ship insured from *London* to *Malta*, *Palermo*, and *Messina*. The declaration states a sailing on this voyage, and a loss by capture. On the trial it was proved that the ship sailed without any convoy for this voyage, *with the privity* of the Plaintiff. The ship was advertised as a running ship, it was perfectly well known, she was to be a running ship, to sail without convoy for this voyage. The Defendant has a right to avail himself of this objection, if the Plaintiff with his privity did put his goods on board, without convoy for the voyage; but it was argued that the Plaintiff's privity alone will not vacate the policy, but that he must be instrumental. Now this is directly contrary to the words of the statute, which are, "privity to, *or* instrumental in." It is not necessary to decide what makes a man instrumental, but it was never before thought that "privity" and "accessary" meant the same thing; and that the Plaintiff is privity is no doubt; and the clause applying to persons "privity *or* instrumental," if he is privity, his insurance is void. But, it is said, the Plaintiff is protected by section 6., which exempts from the operation of the act ships sailing with

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a licence; and that although the act no where uses the expression that the policy shall be void if the ship, with the owner's privity, sails without a licence, yet if the ship did sail without a licence, the owner of the goods not being privy to the want of a licence, he shall not incur the forfeiture. But it would be a strange thing indeed to insert in such an instrument as this, that the shipper *knows* the ship is to sail without a licence. It cannot be necessary, the Plaintiff says, that every shipper of goods must know and see that a proper licence is obtained. The first answer is, every person shipping goods must know and see that a sufficient licence is given. In the next place, what is the captain but the agent of the shipper in respect of these goods? and does he not therefore apply for a licence as such agent? But every shipper of goods may go and enquire at the Admiralty whether such a licence was granted or not; and every merchant knows it is not the practice to grant licences for ships going up the *Mediterranean*. It is impossible to say then, on these two clauses, but that the Plaintiff has offended against this act, the voyage being without convoy, and with his knowledge, and no sufficient licence having been obtained. Whether the Admiralty are right or not in appointing or not appointing convoy for the *Mediterranean*, or in granting or not granting licences, is not for the courts of law to decide; but as the law now stands, and according to the present practice of the Admiralty, this voyage is illegal. It is quite immaterial whether the Plaintiff knew or not that the licence was insufficient. If the captain acted wrong the Plaintiff may have an action against his captain.

HEATH J. I am of the same opinion. I cannot add any thing to what my Lord has said.

CHAMBRE J. was of the same opinion, it was a very clear case.

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Rule absolute to enter a nonsuit. (a)

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(a) *Lawrence J.* was absent, owing to indisposition.

## BROWN v. HODGSON.

Nov. 26.

*PAYNE* sent butter to *London* consigned to *Pen*, by the hands of the Plaintiff, a carrier, who, by mistake delivered it to the Defendant, and he appropriated it to his own use, selling it, and receiving the money. *Pen* had paid *Payne* for the butter, and *Brown*, admitting the mistake he had made, paid *Pen* the value. The Plaintiff declared for goods sold and delivered, and for money paid; and delivered to the Defendant a bill of particulars, "To 17 firkins of butter, 55*l.* 6*s.*," not saying for goods sold. It was objected for the Defendant, that there was no contract of sale, either express or arising by implication of law between the parties, upon this transaction, and that although the Plaintiff might have recovered in trover, he could not bring *assumpsit* for goods sold: the count for money paid was not adverted to at the trial. The jury found a verdict for the Plaintiff.

*Vaughan* Serjt. in this term, obtained a rule *nisi* to set aside the verdict; and

*Shepherd* Serjt. now shewed cause against it, contending that inasmuch as *Pen* might have recovered the value of the butter against the Defendant, it was competent to the Plaintiff, who had paid to *Pen* the value of the

If a bill of particulars specifies the transaction upon which the Plaintiff's claim arises, it need not specify the technical description of the right which results to the Plaintiff out of that transaction.

If a carrier, by mistake, delivers to *B.* goods consigned and sold to *C.*, and *B.* appropriates the goods, and the carrier, on demand, without action, pays *C.* their value, the carrier may recover it against *B.* as money paid to *B.*'s use.

But not as the price of goods sold and delivered to *B.*

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the butter, to sue the Defendant for the price, as money paid for his use.

*Vaughan contra*, contended that the Plaintiff was precluded from taking that ground, because he had made no claim for money paid in his bill of particulars, but only for goods sold.

MANSFIELD C. J. At the trial my attention was not called to the count for money paid, but upon this count I think the action may be sustained. The Plaintiffs pay *Pen* on account of these goods being wrongfully detained by *Hodgson*; they pay the value to the person to whom both they and *Pen* were bound to pay it: and this, therefore, is not the case of a man officiously and without reason paying money for another; and therefore the action may be supported. As to the objection taken respecting the bill of particulars, bills of particulars are not to be construed with all the strictness of declarations: this bill of particulars has no reference to any counts, and it sufficiently expresses to the Defendant, that the Plaintiff's claim arises on account of the butter.

HEATH J. We must not drive parties to special pleaders to draw their bills of particulars.

Rule discharged.

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ROLFE v. ROGERS.

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ROGERS v. BURGESS.

IN each of these causes, which both came on upon the same day, *Vaughan* Serjt. had obtained a rule nisi that the Plaintiffs might not recover their costs, although they had obtained verdicts, the verdicts being for sums under 10*l.*, but might pay costs to the Defendants to be taxed by the prothonotary, upon the ground that they had held the Defendants to bail without reasonable or probable cause, under the statute 43 G. 3. c. 46.

*Best* Serjt. shewed cause in both instances, upon affidavits which established abundant probable cause for both arrests.

The Court discharged both rules, with costs to be paid by the attorney who made the application unless he should produce an exculpatory affidavit, satisfactory to the Court; declaring that it was a shocking thing that when they discharged a rule obtained on suggestions perfectly groundless, and made with no other view than to put a few miserable costs into the pocket of the attorney who directed the application, the consequences should fall on the client who knew nothing of the matter, and desired that their intention to pursue this practice might be promulgated.

If a Defendant's attorney, without sufficient ground, directs an application under the statute 43 G. 3. c. 46. that the Plaintiff, having holden the Defendant to bail and recovered at trial less than 10*l.*, shall pay the Defendant's costs; the Court, in discharging the rule, will direct the costs of the motion to be paid by the attorney.

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WINSTANLEY v. HEAD.

Although a bail, having rendered the Defendant, instigates him to vexatious attempts to obtain his discharge under an insolvent act, the Court will not compel him to pay the costs of the Plaintiff's resisting those attempts.

*PELL* Serjt. made an application, which, he admitted, was *prima impressionis*, that *Walter Head*, the bail, might pay the Plaintiff his costs, occasioned by his opposing the Defendant's discharge under an insolvent act, under the following circumstances. *Walter Head* had rendered the Defendant in his own discharge. The Defendant applied to the Court to discharge him out of custody under an insolvent act: the Court remanded him because he was not an object of the act, having been before discharged. He again, at the instigation of *Walter Head*, applied to the *London* sessions to be discharged, but when he saw that the Plaintiff appeared there prepared to oppose him, he desisted from proceeding with the application: the Plaintiff had been put to considerable expence in opposing and preparing to oppose these applications.

*Per Curiam.* Since *W. Head* has rendered the Defendant, he is no longer bail. Take nothing by the motion.

Rule refused.

1811.



REYNOLDS, Gent., one, &c., v. CASWELL and  
Wife, Administratrix.\*

Nov. 26.

THIS was an action brought by an attorney to recover the amount of his bill for business done for the intestate. Upon the trial of the cause at the sittings in *London*, after *Trinity* term 1811, before *Mansfield* C.J., it was proved that the business had been done for the intestate, and that a bill of costs had been delivered to him before his death, but that after his death no similar bill charging the administratrix, had been delivered to her; the Defendants not producing the bill on notice, the Plaintiff gave in evidence a copy; whereupon *Vaughan* Serjt., for the Defendants, objected that the Plaintiff could not recover, because it was not written in words at length, pursuant to the requisitions of the statute 2 G. 2. c. 23. It contained in fact the following abbreviations, "*Incons* for declaration, *fo.* 18."—"£," *passim*, "*fo.* 24.," Term 11c, "£c.," "*Pd.*" *passim*, "2" fair copies, "*Serjt.*"—"Atty." *passim*, "*Lives* £c." Upon this objection the Plaintiff was nonsuited. It was also objected that as the Plaintiff sought to charge the present Defendant by his action, he ought to have delivered a bill of costs, charging him as his debtor; but *Mansfield* C. J. held that the delivery of a bill, charging the intestate, was sufficient.

An attorney may deliver a bill of costs containing such abbreviations of *English* words as are usual and intelligible.

*Shepherd* Serjt., in this term, obtained a rule *nisi* to set aside this nonsuit, and have a new trial, upon the ground that the statute 12 G. 2. c. 13. §. 5., makes it "lawful for every attorney, clerk in court, and solicitor, to write his bill of fees, charges, and disbursements with such abbreviations as are now commonly used in the *English* language." And that this bill contained no abbreviations but such as are commonly used in correspondence be-

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tween attornies. If the abbreviations are such as the prothonotary and the party can understand, it is sufficient.

*Vaughan* Serjt. now shewed cause, and commented on the abbreviations as unintelligible to any except persons of the profession, whereas, he contended, it was necessary that they should be such as illiterate and ignorant persons, for whose protection the statute was made, could without difficulty understand.

*Shepherd*, in support of the rule. Any person who can understand these words, if written at length, can understand the abbreviations here used. The right to sue was well vested one month after the delivery of the bill to the intestate, and his subsequent death cannot divest it, or render any new delivery of the bill necessary.

MANSFIELD C. J. I am extremely puzzled with this act, by the words "such abbreviations as are commonly used in the *English* language," for many of the words in the bill are not common in the *English* language: they never occur but in attornies' bill, and in books of practice. I really do not know what the act means; but my brothers both think that under this second statute, as these abbreviations are common and intelligible to any professional man, the rule must be absolute. As to the delivery of the bill, there was a complete delivery to the party to be charged in his life time.

HEATH J. agreed in opinion.

CHAMBRE J. The words of the statute are complied with in both the instances, and I see no reason, either of convenience or otherwise, to make us wish that the law were different: all the abbreviations are very common.

Rule absolute to set aside the nonsuit. (a)

(a) *Lawrence* J. was absent this day in consequence of indisposition.

1811.

WRIGHT Plaintiff, WRIGHT Deforciant.

Nov. 27.

IN 1805 *G. Wright* prepared a writ of covenant and concord to pass the fine of a moiety of a small freehold estate, in *Middlesex*, which he held by devise, and he and his wife passed the fine before the Chief Justice, and passed the fine through the alienation office, and some other offices, and paid the fees required; but the concord of the fine had been since lost: the clerk of the *custos brevium* office having now refused to mark the writ of covenant, unless the concord, or a new concord, was produced, *Clayton Serjt.* moved that there might be a new concord and a new acknowledgment, and that they might pass as a part of the old fine.

The concord of a fine being lost before it had passed the *custos brevium* office, the Court permitted a new concord and acknowledgment, to be prepared, and the fine to be perfected.

HEATH J. at first said, he had never known it done, and that it would be a new fine to all intents and purposes. If parties were so negligent, and would lose their documents, they must take the consequences.

Upon conferring, however, with *Mansfield C. J.*, the Court agreed that they could not discover any mischief that would result from it, and without referring to the officers, (who considered it to be contrary to all practice,) permitted it to be done.

Rule absolute. (a)

(a) *Lawrence J.* was absent this day in consequence of indisposition.

1811.

Nov. 28.

Demandant,                      Tenant, O'BRIEN  
Vouchee.

Warrant of attorney, in a recovery, amended by inserting an additional *Christian* name of the vouchee.

**R**UNNINGTON Serjt. obtained permission to amend the warrant of attorney in this recovery, by inserting between the words "*Lancelot O'Brien*," (the name of the vouchee,) the word "*Glanville*," upon an affidavit of the vouchee that he added this name upon the authority of an old family bible, in which it was inserted soon after his baptism.

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Nov. 28.

JEFFS v. SMITH.

If a Defendant pays money into court which the Plaintiff does not take out, but proceeds, and the Defendant obtains a verdict, the Defendant is entitled to full costs of the whole action.

**I**N this action the Defendant had obtained the usual rule of Court, permitting him to pay the Plaintiff, or his attorney, 1*l.*, with costs to be taxed, if the Plaintiff would accept thereof in full discharge of the suit; but if he would not accept the same, then permitting the Defendant to bring the sum into court, and that it should be struck out of the declaration; and that upon trial of the issue, the Plaintiff should take a verdict for so much only as he should prove due to him above the sum of 1*l.* The Plaintiff refused to accept the 1*l.* with costs, and proceeded to trial, whereupon a verdict was found for the Defendant. The prothonotary had taxed for the Defendant the whole costs of the action, whereupon,

*Lens* Serjt. had on a former day obtained a rule *nisi*, requiring the prothonotary to review his taxation, on the authority of *Wilton v. Place*, 2 *Bos. & Pull.* 56., and *Muller v. Hartshorn*, 3 *Bos. & Pull.*, 556.

*Pell* Serjt. now shewed cause. He observed that in both those causes the point arose on consolidation rules, wherein the Plaintiffs in the short causes are entitled to their costs up to the time of paying money into court, though the Defendant succeeds in the cause which is tried, but that in other cases the sum paid into court, if not accepted, is struck out of the declaration, and the cause proceeds as if that sum had never been declared for, consequently if the Plaintiff did not recover more, the Defendant must have his whole costs. He cited *Burfall v. Horner*, 7 T. R. 372. *Davis v. Mansell*, *Willes*, 191. *Stevenson v. Yorke*, 4 T. R. 10. *Kabell v. Hudson*, *ibid.*, and observed that the practice of the Court of King's Bench was to allow the full costs.

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*Lens contra*, observed that the two cases last decided in that court appeared to countenance his application, and it was hard that a new rule should be now adopted in this first instance. (a)

The Court, after consulting with the officers, who stated that the practice had been settled for 35 years, observed that the practice, by which they ought to abide, throws on the Plaintiff all the risk of the action, if after money paid into court, he chuses to proceed with the cause.

Rule discharged.

(a) But see *Skarratt v. Vaughan*, *ante*, 2. 266. *Twemlow v. Brock*, *ante*, 2. 361.



1811.

Nov. 28.

COLES v. F. WRIGHT.

A trader in prison employed an auctioneer to sell goods, who sent him the proceeds by the hands of the Defendant; the trader became bankrupt by lying two months in prison. Held that his assignees could not recover from the Defendant, who was a mere bearer, the money he had so received and paid over.

THIS case was tried at the sittings in *Middlesex* after *Trinity* term 1811, before *Mansfield* C. J., when a verdict was found for the Plaintiffs; and *Best* Serjt., on the first day of this term, obtained a rule *nisi* to set it aside.

Cause was shewn against this rule on a subsequent day in the term, by *Shepherd* Serjt., who cited *King v. Leeth*, 2 *T. R.* 141., and *Vernon v. Hankey*, 2 *T. R.* 113.

*Best* supported his rule, and cited *Sadler v. Evans*, 4 *Burr.* 1984., and distinguished this from the cases cited.

The judgment comprehending the facts, which were few and simple, it becomes unnecessary to state them here.

*Cur. adv. vult:*

**MANSFIELD C. J.** This was an action brought by the Plaintiff, as assignee of the effects of *Samuel Wright*, against the Defendant, to recover money alleged to be had and received by the Defendant, to the Plaintiff's use. The ground of the action is, that *Samuel Wright* the bankrupt had been committed to prison, and after he had been committed to prison, he employed *Robins*, an auctioneer, to sell certain goods, who delivered 79*l.*, the money produced by the sale, to the Defendant, to be carried to his brother, *S. Wright*. *S. Wright* received it, and paid away part of it, and it does not appear what he did with the rest: the Defendant then having received

ceived this sum of 79*l.*, it is said the bankrupt's assignees are entitled to recover, because *S. Wright* became a bankrupt by continuing two months in prison; and upon the trial the defence was, that the Defendant received the money merely as a messenger, or carrier of the money between the one party and the other, and that as such, and having paid it over, he was not liable. We find no case in which this doctrine of relation of an act of bankruptcy, committed by suffering imprisonment, has been carried so far as to charge a man with money received for a trader lying in prison, at a time before he became a bankrupt. There was evidence that the brother knew he was in prison; and it was urged for the Plaintiffs, that inasmuch as every man is supposed to know the law, the Defendant was conscious that his brother would thereby become a bankrupt. There was also evidence of a meeting of creditors to consider the state of *S. Wright's* circumstances, but no evidence that the brother knew it: according to the decided cases the action might be brought against the auctioneer; but it seems a monstrous thing to say, that every one who takes money in the character of a messenger or bearer, should be so liable; it may happen to pass through the hands of two or three persons, who would each be liable to such an action. No case goes that length, and the doctrine of the relation of the act of bankruptcy, is in all cases extremely hard, and in many shocking, and it is not to be carried further than we are compelled to carry it: and therefore we think we are bound to say that the Defendant is not liable to this action, and the rule *nisi* to enter a nonsuit must be made

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 v.  
 F. WRIGHT.

Absolute.

1811.

Nov. 23.

SARRATT and Another, Assignees of COLLIER,  
a Bankrupt, v. AUSTIN.

If two persons exchange acceptances, and before the bills are mature, one of the acceptors commits an act of bankruptcy, there is not such a debt due from him to the other as will sustain a commission, before the other has paid his own acceptance.

THIS action was tried at *Guildhall*, at the sittings after *Trinity* term 1811, upon admissions. It was an action of trover by the assignees of a bankrupt, against the sheriff, for the lease of an iron-foundry and other goods taken in execution at the suit of *King*, and the only question was as to the sufficiency of the petitioning creditor's debt. He and the bankrupt had drawn two bills on each other, of precisely the same tenor and dates, and each had accepted the other's bills. Before any of the bills became due, the bankrupt committed an act of bankruptcy, upon which a commission was issued, founded upon the acceptances so given by the bankrupt. Neither of the bills was due or paid when this action was brought. A verdict was found for the Plaintiffs, with liberty to the Defendant to move to set it aside and enter a nonsuit.

*Shepherd* Serjt. in this term obtained a rule *nisi* for that purpose, upon the ground that there was no "good and valuable consideration" in the acceptance of accommodation paper, not due, whereon to found a commission. If it were so, the bill might be paid twice over; for the holder of the other equivalent bill given in exchange would have a right to prove that bill as a debt against the bankrupt's effects, if it be not paid by the acceptor when due, and if he recovers that amount, there is no consideration for the bill which the bankrupt has accepted.

*Rough* Serjt. on a subsequent day shewed cause against this rule. These counter-acceptances constitute a sufficient

ficient debt within the statutes 7 G. 1. c. 31. §. 1. and 5 G. 2. c. 30. §. 22., to support this commission of bankruptcy. It is clear that if a third party intervenes, a counter-acceptance is a good consideration to constitute a debt to be proved under the commission. *Rolfe v. Caslon*, 2 H. Bl. 570. *Pattison v. Banks*, Cowp. 540., only differs, in that it relates to the stat. 5 G. 2., which has been called a legislative exposition of the former act; and it was there held, that all bonds, bills, and notes, payable at a future day, were comprehended within the second statute, though not within the first. *Crisp v. Perrit*, *Willes*, 467., decided the same point.; these authorities have been followed in the cases of *Touffaint v. Martinant*, 2 T. R. 100. *Martin v. Court*, 2 T. R. 640. *Cowley v. Dunlop*, 7 T. R. 565. *Buckler v. Buttivant*, 3 East, 72. *Ex parte Walker*, 4 Ves. 373. *Ex parte Bloxain*, 8 Ves. 531. These last cases having decided that all bills payable at a future day are a good and valuable consideration, and *Rolfe v. Caslon* having decided that a counter-acceptance is to be looked on, not as an indemnification, but as a creating of mutual debts, capable of being proved, it is clear that there is a good petitioning creditor's debt in this case, unless it be required, as is urged, that the debt to support a commission must be of a different nature from a debt which may be proved under a commission, but there is no foundation for any such distinction. Before the stat. 5 G. 2. c. 30. §. 23. any person might have sued out a commission. Sect. 22. enables any person to prove a debt payable at a future day, and §. 23. prohibits the issuing of any commission unless the debt of the petitioning creditor be of a certain amount. Expounding the statute by aid of its own context, the debt which is required for the one purpose, must necessarily be such an one as is defined to be a debt for the other purpose. The person who has given the longest credit, ought to be the most an object of the assistance  
of

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of the legislature, and is so, as it appears, from the legislature having interfered, after several years consideration, to enact this stat. 7 G. 1., expressly for the protection of such persons, their case having been left without remedy under former acts. Upon the motion for a rule *nisi* the Court observed, that it would be singular if a person might sue out a commission, who perchance, in case he did not pay his own acceptance, would never be entitled in equity to receive any thing under it. But in the case *Ex parte Lingood*, 1 Atk. 240. it was held, that a sum awarded was a good debt to support the commission, though proceedings were pending to set aside the award, there being a debt then subsisting, as there is here, but it being in that case, as here, uncertain, whether it might ultimately prove that the debt would be payable. *Ex parte Crisp*, 1 Atk. 134. was an instance that a commission may issue upon the petition of one who can never entitle himself to a dividend under it, the debt being due from three partners, and the commission issuing against one of them only. An acceptance of this sort constitutes a legal debt, and it is not for this Court, but only for a court of equity, to enquire whether any equitable debt subsists, or whether it is extinguished or satisfied by collateral securities. In the case of *Chilton v. Wiffin*, 2 Wils. 17., *Wilmot C. J.* held, that the drawer of a bill of exchange instantly upon his drawing the bill contracts a debt.

*Shepherd, contra.* If this doctrine be correct, two persons who exchange paper, may instantly after the exchange, sue out a commission each against the other; though it is clear that neither can ever receive one farthing dividend against the other, the two demands being extinguished by a set-off. [*Mansfield C. J.* There you assume a term which is not proved in this case, that the bill on which the commission is founded remains

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in the hands of the drawer; for if it be in the hands of a person to whom he has paid it over, there can be no set-off. If the party had negotiated the bill, it would be no answer to an action brought by the holder against the acceptor, to say that the acceptance given by the drawer as the price of such acceptance remained unpaid. A man who negotiates a bill must be understood to have received money for it: he is security to the person from whom he has received money for it, that the bill shall be paid: upon an exchange of bills, the man who has received the counter-bill, which he has negotiated, and thereupon has received money for it, has in effect received the money as the price of his acceptance.] The petitioning creditor is liable to pay both bills, if they are negotiated, the one as drawer, the other as acceptor. [*Heath J.* That liability subsists from the very beginning, and arises from the nature of the transaction; it is no consequence of the bankruptcy.] The cases cited, though they shew that under the circumstances a bankrupt may be discharged by his certificate, do not prove that the person giving the counter-acceptance might have sued out a commission, nor even that a person who acquired the bill after the commission issued, could have proved it as a debt. [*Mansfield C. J.* It was once held in the Court of King's Bench, in the case of *Howis v. Wickens*, 4 *T. R.* 714., that it might be so, but that case has since been over-ruled: the same question occurred in this court, and we were pressed by a decision of the Exchequer in support of *Howis v. Wickens*, but we held that a creditor cannot be charged after the commission issued, nor after the act of bankruptcy; but that if *A.* holds an acceptance of the bankrupt, and omits to prove it, he cannot indorse it over to another, and thereby enable the new holder to recover thereon, notwithstanding the certificate.] Although under 7 *G. 1.* the petitioning creditor might prove his acceptance as a debt,

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debt, the proof would not ultimately be available, unless he should pay his own acceptance. That is the condition of the acceptance he receives, and if not performed, there is no debt. [*Mansfield C. J.* That point was made and overruled in the case of *Rolfe v. Caslon.*] The argument is not, that it is a contingent or conditional debt, which cannot be barred by the certificate, but that upon failure of the condition the debt falls to the ground, and consequently all the proceedings must fail which are supported by it. That there is a well-founded distinction between such a debt as may be proved under a commission and such an one as will sustain a commission, appears from the cases of *Hogkins v. Duperoy*, 9 *East*, 498., and *Cotbay v. Murray*, 1 *Campb.* 334., where it was held that a promise to give a bill upon the sale of goods for the price, was not a sufficient debt to support a commission, although it is expressly named in the stat. 7 *G. 1.* as one of the species of engagements payable at a future day, which that statute permits to be proved with a rebate of interest.

*Cur. adv. vult.*

On a subsequent day, *Shepherd* said that he had been furnished with three cases not in print, in which Lord *Eldon* and Lord *Loughborough*, Chancellors, had holden that a party possessed of counter-bills shall not be permitted to prove them till he has paid his own bills. *Ex parte Everett*, 3d *May* 1800. That was the case of a petition by the assignees of *Dockson*, praying that they might be permitted to prove a debt under the commission of *Caldwell* and Company, who had accepted bills for *Dockson*, who had given them counter-bills which were not paid. Lord *Loughborough* held that they could not prove the debt till the bills accepted by *Dockson* had been taken up. *Ex parte Brown*. That was the case of a petition to prove on an indemnity-bond, given in order

to indemnify *Brown* against another bond which was given before the bankruptcy, and the Court rejected the application. [*Mansfield C. J.* That was clearly the law with respect to all indemnity-bonds before the late act of parliament, it was the same with bills before the act 7 G. 1.] *Ex parte Ward*, 28th June 1794. That was a petition to be permitted to prove under a commission of bankrupt, on cross-bills of exchange. The Chancellor held, that the petitioner not having taken up his own bills, he could not be permitted to prove, and dismissed the petition. In Lord *Clanricarde's* case, *Cooke*, 3 Ed. 203., before Lord *Thurlow* Chancellor, Lord *Clanricarde* had given counter-bills which he had not paid: Lord *Thurlow* permitted him to prove the bills he held, but afterwards expressed a doubt to Lord *Eldon*, then attorney-general, whether he had not gone too far in that. [*Mansfield C. J.* I should have had no doubt, if you had not mentioned these cases, that the person who gave the counter-bills might prove under the commission. The debt is barred by the certificate, as has been decided. Why is it barred at law? because it might have been proved under the bankruptcy. It is strange to say then, that it cannot be proved: either the one or the other decision must be wrong. In Lord *Clanricarde's* case, the Chancellor permitted Lord C. to prove his bills, but staid the dividend. That decision, therefore, does not affect this case at all, and it is directly contrary to the cases you have just now cited.

MANSFIELD C. J. on this day delivered the opinion of the Court.

The question here is, whether a commission of bankruptcy can be supported on the petition of a creditor, who was only a creditor by holding a bill accepted by the bankrupt, he having at the same time accepted a counter-bill drawn by the bankrupt upon him, which bill,

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bill, accepted by the petitioning creditor, appears not to have been paid by him at the time when the commission was taken out. The ground of the objection is, that, at the time of the suing out of the commission, no debt was actually due to the petitioning creditor; and the question is, whether, under such circumstances, he has such a debt due to him within the meaning of the statute, as will enable him to sue out a commission of bankrupt. That depends entirely upon the construction of the stat. 7 G. 1. c. 31.; for 7 G. 1. is referred to by 5 G. 2. c. 30., and they must be taken together, as one statute. Now the words of the 7 G. 1. are these: "Whereas merchants and other traders in goods have been very often obliged, and more especially of late years, to sell and dispose of their goods and merchandizes, to such persons as have occasion for the same, upon trust, or credit, and to take bills, bonds, promissory notes, or other *personal* (a) securities for their monies, payable at the end of three, four, or six months, or other future days of payment, and the buyers of such goods becoming bankrupts, and commissions of bankruptcy being taken out against them before the money upon such bonds, notes, or other securities became payable, it hath been a question, whether such persons, giving such credit on such securities, should be let in to prove their debts, or be admitted to have any dividend, or other benefit by the commission, before such time as such securities became payable, which hath been a great discouragement to trade, and great prejudice to credit within this realm." This preamble speaks of the necessity of these instruments being rendered available, and it supposes that these bills are given for goods; it speaks of purchasers of goods, and has not the least

(a) See *Pattison v. Banks*, the 4to edition of the statute, Cowp. 540., correcting the clerical error which has crept into securities.

idea of any bill being given where a debt is not clearly due. Then it goes on to enact, "That all and every person and persons, who have given credit, or at any time or times hereafter shall give credit on such securities as aforesaid, to any person or persons, who is, are, or shall become bankrupts, upon a good and valuable consideration, *bonâ fide*, for any sum or sums of money, or other matter or thing whatsoever, which is or shall not be due or payable at or before the time of such person's becoming bankrupt, shall be admitted to prove his, her, and their several and respective bills, bonds, and notes, or other securities, promise or agreements for the same, in like manner as if they were made payable presently, and not at a future day; and shall be entitled unto, and shall have and receive a proportionable part, share, and dividend of such bankrupt's estate, in proportion to the other creditors of such bankrupts, deducting only thereout a rebate of interest, and discounting such securities payable at future times, after the rate of *five pounds per centum per annum* for what he shall so receive, to be computed from the actual payment thereof, to the time such debt, duty, or sum of money should or would have become due and payable in and by such securities as aforesaid." Here the statute speaks of debts due at a future time, every word of it supposing a debt to be actually due. Then comes the restrictive clause, *f. 3.*, that such a debt shall not suffice for a petition to sue forth a commission; then comes the statute *5 G. 2. c. 30. f. 22.*, which does nothing but repeal the restrictive clause, that it shall not suffice for a commission. This statute does nothing for the proof of debts which are in their nature contingent. There are other statutes which enable the party to prove contingent debts. This debt is not, on the face of the instrument, contingent; but it is thus far, in the nature of the transaction, contingent, that till the drawer has

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paid his counter-bill, the Court of Chancery will restrain him from receiving any dividend. Therefore, though it is, on the face of the instrument, a debt payable at a future time, it is, in its nature, a contingent debt. The cases cited decide nothing on this point. And it would be a singular construction on these acts, that though a man, at the time of taking out a commission, is not entitled to receive a shilling out of the bankrupt's estate, nor ever will receive a shilling, unless he pays his counter-bill, he shall be able to stop the bankrupt's trade, and take all his effects into his own hands, by this, which is not improperly called a statutory execution, in order that they may be divided amongst all the other creditors of the bankrupt, though himself is not entitled to receive any part thereof: and as no case has hitherto decided that the holder of such a bill is a creditor who may sue out a commission, we are bound to decide, upon principle, that he is not such an one; the Court, therefore, is of opinion that the action cannot be maintained, and the rule *nisi* to set aside the verdict and enter a nonsuit must be made

Absolute.

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## WHITE v. PROCTOR.

Nov. 28.

THIS was an action brought by the Plaintiff, to recover from the Defendant the excise duty, which had been paid to government by the Plaintiffs, who were solicitors for the vendor of an estate, and which duty was to be paid by the Defendant, according to the conditions of his alleged contract for the purchase of an estate by auction, which had been knocked down to him by the auctioneer. Upon the trial of the cause at *Guildhall*, at the sittings after *Easter* term 1811, before *Mansfield* C. J., the evidence was, that a sale of lands by auction being advertised, the auctioneer was prepared with a paper in the following form, "Sale of Mr. *Kemey's* estates at the *West-gate-house*, at the town of *Newport*, on *Wednesday* the 26th day of *September* 1810. Comprised in six lots.

| Lots. | Price each lot was put up at. | Reserved price, exclusive of timber and coppice wood. | Purchase price. | Duty at 7d. in 1l. | Purchaser's name. |
|-------|-------------------------------|-------------------------------------------------------|-----------------|--------------------|-------------------|
| 1.    | £c. 10.                       | £. 600.                                               |                 |                    |                   |

The 2d condition of the sale was, that the highest bidder should sign a contract for the purchase: the 6th was, that the timber and coppice wood should be taken at a price to be fixed before the sale. Another was, that the purchaser should pay the auction duty. At the time of the sale a paper was exhibited to the bidders, in which 3700*l.* was stated as the price of the timber and coppices in the first lot. The Defendant was present, but did not bid: *Stokes*, an attorney, who was the

An auctioneer is by implication an agent duly authorized to sign a contract for the purchase of a real estate on behalf of the highest bidder.

And his writing down the name of the highest bidder in the auctioneer's book is a sufficient signature to satisfy the statute of frauds.

And if the highest bidder is agent for another, the auctioneer's signature of the bidder's name will bind the principal.

\* At least if the principal is present, and consulting with the agent during the sale, and makes no objection before the entry made in the book.

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agent of the Defendant, bid several times: the Defendant and *Stokes* consulted together; they desired the bidding might be suspended, and went out of the room, and again consulted together. After their return the lot was knocked down to *Stokes*, as the highest bidder, for the price of 8600*l.*, and the auctioneer immediately entered in the fourth column of the above mentioned paper "8600*l.*," as the purchase price, in the fifth, "253*l.* 15*s.*," as the amount of the excise duty, and in the sixth, "Mr. *Stokes*," as the name of the purchaser. After the sale was over, *Stokes* being requested to sign a written contract for the purchase, alleged that he had bid the sum of 8600*l.* under a misunderstanding, conceiving that that sum was intended to be inclusive of the price of the timber and coppice wood, whereas it was now alleged to be exclusive of it, and the Defendant objected that *Stokes* had exceeded his authority, if the sum were exclusive of the wood, and expressly directed him not to sign any contract. There being therefore no other signature by the party to be charged, than the writing of *Stokes's* name by the auctioneer in the sixth column, it was contended by the Defendant, that this was not sufficient to take the case out of the statute of frauds: the jury, however, found a verdict for the Plaintiff, subject to this point reserved, upon which

*Best* Serjt., in *Trinity* term last, obtained a rule nisi for setting aside the verdict, and entering a nonsuit.

*Lens* Serjt., in this term, shewed cause, contending that this case was governed by that of *Emmerfon v. Heelis*, ante 2. 38., where it was ruled that the auctioneer was an agent to sign for the purchaser upon a sale of land. The only difference is, that here the name of the auctioneer is not found signed or written by himself as it was there; but that is immaterial, for

it is the name of the purchaser, not of the agent, which by the statute is required to be signed.

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*Best*, in support of his rule. If this were *res integra* it might reasonably be doubted, whether the auctioneer appointed *ex parte* by the one party, shall be, by necessary consequence, an agent lawfully authorized to sign for the other. But admitting that point to be decided, there is in the present case no signature either of the party purchasing, or of his agent. In *Emmerfon v. Heelis*, the auctioneer wrote his own name in the heading of the paper, and the case was decided on that ground. [*Mansfield C. J.* In that case there was no argument upon the circumstance that the auctioneer had signed, nor was the case at all decided on that ground: his saying "sold by *John Wright*" did not make him agent for the buyer: the only question was, whether his signing the purchaser's name was done by him as agent for the purchaser.] Here is no signing of the Defendant's name, as purchaser: the auctioneer signs for *Stokes*, and therefore, according to *Emmerfon v. Heelis*, this action might have been maintained against *Stokes*: but *Stokes* is not the Defendant, but only the Defendant's agent. By virtue of the authority invested in him, *Stokes* might have signed the Defendant's name, and it would have bound him: but *delegatus non potest delegare*; he could not transfer to the auctioneer the power of signing for the Defendant, and the Defendant when called on to sign himself, after the sale, expressly refused, and repudiated the signature, and *Stokes*, by the Defendant's express direction, also refused to sign. The second condition of sale likewise excludes a signature by the auctioneer, for it is, that "the highest bidder should sign a contract for the purchase." An auctioneer may be an agent by implication, but it is impossible he should be an agent in express contradiction to the directions of his principal.

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[*Heath J.* *Stokes* must have appeared as principal to the auctioneer. *Mansfield C. J.* If an agent has cut his finger so that he cannot write, and says to another, write down my name, will not that signature bind the principal?]

*Cur adv. vult.*

MANSFIELD C. J. now delivered the opinion of the Court.

This is an action brought to recover the auction duty, paid by the auctioneer. On looking at the case of *Emmerson v. Heelis*, it is impossible to distinguish this case from that. The question there was, first, whether the thing contracted for was an interest in land, and that being decided, the next question on which it turned was, whether there was a signature of an authorized agent for the buyer? and it was there held that entering the name of the buyer in the auctioneer's book was just the same thing as if the buyer had written his own name. There is no distinguishing the two cases; here the auctioneer writes down the name of the buyer; and therefore that is sufficient, and the

Rule must be discharged.

END OF MICHAELMAS TERM.

# C A S E S

ARGUED AND DETERMINED

1812.

IN THE

Courts of COMMON PLEAS,

AND

EXCHEQUER-CHAMBER,

IN

Hilary Term,

In the Fifty-second Year of the Reign of GEORGE III.

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WRIGHT and Another v. WAKEFORD.

Jan. 23.

THIS was a case directed for the opinion of this Court, by Lord Eldon, Chancellor. By indentures of lease and release, bearing date respectively the 10th and 11th days of June 1776, the release being of six parts, and made between *Thomas Wood* the elder and *Ann* his wife of the first part; *Thomas Wood* the younger of the second part; *Mary Wood*, the wife of *Thomas*

A power to trustees with the consent of the *cestui que trusts*, testified by writing under their hands and seals, attested by two or more credible witnesses, to make sale of lands, is not well pursued

if the attestation be only sealed and delivered in the presence of the two witnesses. By three against *Mansfield* C. J.

And an attestation added after many years, witnessing the signing, sealing, and delivery at the time of making the deed, will not supply the defect. By three against *Mansfield* C. J.



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*Wood* the younger, of the third part; *Edward Bacon* and *Robert Hudson* of the fourth part; the Right Honourable *Horatio Lord Walpole* and *Henry Wilmott* of the fifth part; and *Sir Joseph Mawby* and *John Smith Budgen* of the sixth part; in consideration of a marriage then intended, and shortly afterwards had, between *Thomas Wood* the younger and *Mary* his wife, and for other considerations, divers hereditaments, (being parts of the hereditaments agreed to be purchased by the Defendant,) were settled, limited, and assured unto *Edward Bacon* and *Robert Hudson*, their heirs and assigns, to the uses, and subject to the powers and provisoes in the same indenture of release particularly mentioned; and it was, amongst other things, provided, that it should be lawful for *Edward Bacon* and *Robert Hudson*, and the survivor of them, and their heirs, at any time or times, with the consent and approbation of *Thomas Wood* the elder and *Thomas Wood* the younger, or the survivor of them, testified by any writing or writings under their and his hands and seals, or hand and seal, attested by two or more credible witnesses, to make sale and dispose of all or any of the hereditaments and premises therein mentioned, and that the receipt of *Edward Bacon* and *R. Hudson*, and the survivor of them, or his heirs, should be a good discharge for the purchase-money. And by indentures of lease and release dated the 3d and 4th days of *March* 1788, and made between *Robert Hudson*, (*Edward Bacon* being then dead,) of the first part, *Thomas Wood* the elder and *Thomas Wood* the younger of the second part, and *Giles Hibbert* Esquire, since deceased, of the third part; after reciting the before stated indentures of the 10th and 11th days of *June* 1776, and further reciting that *Giles Hibbert*, with the consent and approbation of *Thomas Wood* the elder and *Thomas Wood* the younger, testified by their being parties to, and signing, sealing, and delivering the said inden-

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tures, had contracted and agreed with *Robert Hudson* for the absolute purchase of the manor, messuages, lands, tenements, and hereditaments, thereafter particularly mentioned and described, with their appurtenances, and of the fee simple and inheritance thereof, it was witnessed, that in consideration of the sum of 15,988*l.* to *Robert Hudson* paid by *Giles Hibbert*, with the consent and approbation of *Thomas Wood* the elder and *Thomas Wood* the younger, testified as above mentioned, *Robert Hudson* did in pursuance and execution of the said power for that purpose contained in the said recited indenture of release, and of all and every the powers and authorities vested in him, bargain, sell, aliene, and release, and confirm, and *Thomas Wood* the elder and *Thomas Wood* the younger did grant, bargain, sell, aliene, and release, ratify, and confirm, unto *Giles Hibbert*, his heirs and assigns, among other hereditaments, the hereditaments comprized in the said indentures of settlement, and agreed to be purchased by the Defendant, to hold the same with their appurtenances unto and to the use of *Giles Hibbert*, his heirs and assigns. But the memorandum of attestation of the execution of those indentures of the 3d and 4th days of *March* 1788, indorsed thereon, is contained in the words and figures following, namely: “*Scaled and delivered* by the within named *Robert Hudson*, *Thomas Wood* senior, and *Thomas Wood* junior, in the presence of *Charles Bicknell*, *Chancery-lane*, and *George Burley*, *Lincoln’s-Inn*.” And during the lifetime, and up to the time of the death of *Thomas Wood* the elder, no other memorandum of attestation of the execution of the said indentures was indorsed on the same indentures or either of them; but after the death of *Thomas Wood* the elder, another memorandum was indorsed and signed upon the same indenture of release, in the words following, (that is to say:) “We do hereby attest and certify, that the within written

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indenture, at the time of the execution thereof, as above attested, was signed, as well as sealed, and delivered, by the several parties within named, in our presence: as witnesses our hands, this 13th day of *November* 1810. *Charles Bicknell. George Burley.*" And the question for the opinion of this Court was, Whether the power of sale, as contained in the indenture of release bearing date the 11th day of *June* 1776, was duly and effectually executed by the indentures of the 3d and 4th days of *March* 1778, or either of those indentures?

This case was argued in *Easter* term 1811 by *Lens* Serjt. in support of the validity of the execution. He contended, first, that the first execution was good in substance, and the attestation sufficient; secondly, that if it were not, the subsequent memorandum made it sufficient. As to the first point, the instrument appears upon view to have been signed, and is exhibited as signed. It might indeed have been more correct, if the witnesses had precluded all question by narrating every thing they saw; but that is not necessary. The difficulty arises from their doing more than is necessary for the purpose, not from their doing too little. "Attesting" means witnessing: if the parties had executed, and the attestation had been "*witnesses A. B. and C. D.*" that would unquestionably have been sufficient. But if the argument be, that *expressio unius est exclusio alterius*, and that because they aver they did see the sealing, therefore it is to be inferred they did not see the signing, that militates with all common apprehension and practice. In the case of a bond, if there be a seal, the delivery is presumed, and though there be no attestation, the bond is good. There are few cases in point: those which bear on the execution of wills under the statute of frauds, are the most analogous. The words of the statute 29 *Car. 2. c. 3. s. 5.* are, "attested and

subscribed in the presence of the devisor by three or four credible witnesses." In *Willes Rep.* 1., *Brice v. Smith*, it was held, that the attesting witnesses need not express that they subscribed their names in the presence of the testator, although it is a matter to be left to a jury, whether they did so subscribe in the devisor's presence or not. [*Mansfield C. J. acc.*] If the jury find that they did so subscribe, there is nothing left unfinished. So, in this case, the act of Messrs. *Wood*, by whose consent the estate was to pass, is complete: nothing remained to be done by them, and although the description of what they so did was left imperfect at that time, it was more completely supplied by the subsequent indorsement. The conclusion of the deed also expresses that the parties did thereunto set their *hands* as well as their seals, and the attestation must be taken as referring to that declaration in the deed. The terms of the power are at least substantially complied with. *Kibbett v. Lee*, *Hob.* 312. 3. A power of revocation is to be taken liberally, and the execution of it favourably. 11 *Vesf.* 477. *Macqueen v. Farquhar*. A power of appointment was to be executed by any deed or writing to be by *W. Abney* signed and sealed in the presence of two or more witnesses, or by his last will and testament attested by three or more credible witnesses, and the attestation of an appointment made by deed noticed only the sealing and delivery, and not the signing, yet Lord *Eldon*, Chancellor, compelled a purchaser to accept a title derived under such appointment. In that case, indeed, the words "attested by" did not apply to the deed, but only to the will; but Lord *Eldon* there says, "It would be a miscarriage in a Judge directing a jury not to presume that the deed was signed in the presence of the same witnesses, in whose presence it professed to be sealed." He rested, however, the less upon this autho-

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rity, because the present case was directed by the same learned person who decided that.

*Shepherd Serjt., contra*, contended that the execution of this appointment was invalid. As to *Macqueen v. Farquhar*, the omission in the power of the word "attested" makes the whole difference. 2 Vent. 350. *Sayle v. Freeland*. Held that a will, subscribed by two witnesses, was good as the revocation of a power, requiring a writing to be executed in presence of two witnesses, though bad as a devise. Again, many instruments may take effect as good common law conveyances, which would not be good as executions of powers. 2 Freem. 193. *Duke of Albemarle v. Monck*. S. C. more fully, 3 Chanc. Caf. 55. reported by the name of *Bath v. Montagu*. The power of revocation was to be exercised by deed or writing to be executed in the presence of six witnesses, three whereof to be peers. The person empowered made a will executed by three witnesses, in order to revoke the uses of the settlement; but it was held by the Lord Keeper, two Chief Justices, and *Powell B.*, that though it was good as a will, it was no revocation of the power. He who creates a power, may invest it with such conditions and circumstances as he will; and they must be all observed; and if he adds the word "attested," as a necessary condition of the signing, sealing, and delivery, the attestation must embrace them all; and it must be simultaneous with the execution, that there may always be seen upon the deed, and accompanying it, the proof of the consent of these parties; for it is not the passing of the estate that is required to be thus evidenced, but the consent of these two parties to the alienation of the land. Admitting that if the attestation were general, the due observance of all the ceremonies might be presumed, yet the same inference

inference does not arise from a defective attestation. [Mansfield C. J. observed, that this deed did not expressly require any signature, but only said, "under hand and seal," supposing, perhaps, that all instruments sealed at this day are signed, unless where there is great carelessness, or some particular reason. Formerly no signing was practised, because people could not write, and the seal was the only mark by which they could identify their act; and even at this day a deed is a perfectly good deed, (unless where the statute of frauds intervenes,) without signing; but might it not be argued in favour of this execution, that the common words "under hand and seal," in their fair import mean no more than such an execution as is the usual due execution of a deed, although it would not literally be under hand, unless the party executing signed it?] That construction would reject the essential word "hands," and in the execution of this power the performance of all the conditions must concur; and in these days, the signature is a much stronger identification of the deed than the sealing. To hold that the attestation may be added at any future time, would defeat the purpose for which it was intended, which was for the purpose of making it known upon the sight of the deed whether any valid revocation has been executed. If the attestation be wanting, the remainder-man may enter, possess, and convey, upon the faith of this defect, and the witnesses by a subsequent attestation made at any time during their lives, may divest his or his assignee's estate. *Harvins v. Kemp*, 3 *Eq. l.* 410., where the terms of the power required the deed of appointment to be inrolled, a deed of revocation, properly in other respects executed, but not inrolled till after the settlor's death, was held void. Therefore at all events the amended attestation could not be added but during the life of both these *Woods*. [Lawrence J. In that case it was considered that the

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inrolment was a thing to be done personally by the party, and that his consent was to be requisite thereto, and that it was done without his consent. That case was decided on the authority of *Christopher Digge's* case, 1 Rep. 173. *Mansfield* C. J. It was considered that after sealing the deed, he might have said, "I will not inrol it." But here, the party revoking has done at the first all that belongs to him to do, the remaining act is not to be done by him, but by the witnesses. *Lawrence* J. And why may not the witnesses add that act at any time? *Mansfield* C. J. It is admitted that they might add it during the life of the person executing, why not equally after his decease? The mischief of mesne conveyances and subsequent appointments taking effect, would be equal whether the attestation be added in his lifetime or afterwards.] The operation of the deed would depend on the caprice of the witnesses, as they might either chuse or refuse afterwards to add their names.

*Lens* in reply. The question turns solely on the meaning of the word "attest," which is *testor ad*. It is a mere arbitrary assumption of the term, that the witness must express in writing every thing that he saw. [*Lawrence* J. It has not been unusual, where a bond has been executed without an attesting witness, that a person who was present at the making of it, and who has been present in court, has been called upon at *nisi prius*, then to write his attestation, for the purpose of calling him as the attesting witness. *Chambre* J. And that practice has sometimes been rendered subservient to purposes of fraud. I remember that in a case where one attesting witness knew too much of a transaction to serve the purposes of the Plaintiff, he procured another person, who was present at the making of the bond, to attest it, for the purpose of preventing the necessity of calling

calling the first.] *Lens* denied that if the party executing the power had done all that rested on him to make the appointment complete, he could give validity to another subsequent appointment; there was no authority to prove that he could so retract his consent, when once given; and therefore the mischief of subsequent mesne appointments did not subsist. The term hand and seal may be satisfied by the party putting his hand to the seal. As to "signing," *signum* in old books does not mean writing, but any peculiar mark, as a seal. *Signata charta* did not mean signed in writing. As to the argument, that without the full attestation, it cannot be known by looking at the deed whether there was a good execution, the answer to it is, that upon inspection of the deed the signature of the name appears, and if there be any doubt whether it was duly affixed, that doubt may be cleared up by referring to the attesting witnesses, or to the parties themselves, for information. If they had attested that it was signed and sealed in their presence, when in fact it was not, that attestation would not make it a good appointment. As to *Hawkins v. Kemp*, although the inrolling was held to be a personal act, the case probably did not turn upon that, for the alteration of an estate between the execution and enrolment of a deed is often fatal. *Co. Lit.* 52. *b.* It is held, that if the lessor by his deed licence the lessee for life or years, (which is restrained by condition not to aliene without licence,) to aliene, and the lessor dieth before the lessee doth aliene, yet is his death no countermand of the licence, but that he may aliene, for the licence exempteth the lessee out of the penalty of the condition, and it was executed on the part of the lessor as much as might be. The consent here was complete, and the estate passed: it is clear, and is admitted, that the witnesses might have added the attestation half an hour

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hour after the execution : why therefore may they not in like manner add it at any subsequent time ?

*Cur. adv. vult.*

On this day the Judges of this Court sent to the Lord Chancellor the following certificate.

This case has been argued before us by counsel, and we have considered of it.

I am of opinion that the power of sale in this case was duly and effectually executed by the indentures of the 3d and 4th days of *March* 1788. The only objection made to the execution of the deeds, is, that the signing of the consent of the *Woods* is not properly attested ; but it appears to me, that though the form of attestation does not contain in it the word “ signed,” the witnesses must be understood to have attested the signing, as well as sealing of the deeds by the two *Woods*. Whether the omission of the word “ signed” in the attestation arose from a mistake of the witnesses, or some clerk, who wrote the attestation as in the common form of attesting the execution of a deed, does not appear ; but whatever was the cause of it, I think that that omission is immaterial.

From the circumstance of the *Woods* being made parties to the deed of release, and joining in the conveyance of the estate, it might very naturally be supposed, that the thing to be attested was not merely signing and sealing, but the execution of the deed in the ordinary way, and as the deed was signed by the *Woods*, I think that the attestation must be understood to apply to the signing, as well as the sealing and delivery. Though by the rules of law, signing is not necessary to the completion of a deed, yet by long established and universal practice,

practice, signing is now considered as an essential part of the execution of a deed; and I cannot believe that any man of business now living, has accepted, or would accept a deed that was not signed, or would attest the execution of a deed that was not signed; and therefore, when the witnesses in this case attested the execution of the deed by the *Woods*, they must be understood to attest the signing. I am also of opinion that in this case, if for want of the word "signed" the first attestation had been insufficient, the subsequent attestation by the same witnesses would have supplied the defect; for it appears to me, that by the second attestation, the witnesses must be understood only to have done that more formally, which they had in effect done before, and which they must know to have been done, by seeing their signatures upon the instrument. I am also of opinion, that if the former attestation had not been made, the second attestation alone would have been sufficient; as I think, that the witnesses might at any time after the execution of the deeds, and the consent of the *Woods* under their hands and seals, have signed the attestation. The word "attest," in its strict and proper sense, I apprehend, means only witnessing, or bearing witness to; and the principal object in requiring that an instrument should be executed in the presence of witnesses is, that they may see that the instrument is properly and fairly executed: but in the ordinary use of the word "attest," as applied to the execution of deeds, it is understood to require that the witnesses should attest in writing; the principal end of which seems to be, to preserve evidence of the instruments being executed in the presence of the witnesses required; but I know no rule, or case, which requires that the attestation should be immediately written at the time of the execution of the instrument, or within any particular limited time after its execution; and, therefore, so long as the witnesses live and remember the transac-

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transaction, they may, I think, properly write or sign their attestation; and unless there is some evidence of fraud in the case, they must be presumed fairly to do so. The death of the party whose act they are to attest, does not, I think, furnish any objection to their signing the attestation after his death, because when he has once signed or executed in the presence of witnesses the instrument to be attested, he has done all that is to be done by him, and, as far as respects him, it is completed, and he cannot rescind or annul it, although it will not be effectual as against others, unless the person to whom it is delivered shall procure the witnesses to attest it. The only objection that I know to have been made to the witnesses signing their attestation at a distant time, is, that it might afford an opportunity for fraud; but I think that this objection is of no weight. If the fraud apprehended is, that witnesses might be prevailed upon fraudulently to attest an instrument, which they had not seen executed, such fraud would not be prevented by requiring that the attestation should appear to be signed at the time of the execution of the instrument, because the witnesses might nevertheless, without any danger of detection, fraudulently sign an attestation, and either put no date to it, in which case it would be presumed to be written at the time of the execution of the instrument, or put the same date with that of the execution of the instrument. If the fraud apprehended is, that the witnesses might be imposed upon, and prevailed upon honestly to sign an instrument which they had not seen executed, that appears to me to be quite beyond the bounds of probability.

J. MANSFIELD.

We are of opinion, that the power of sale in this case was not duly and effectually executed by the indenture of the third and fourth days of *March* 1788. Accord-  
 ing

ing to the provisions of the release of the 11th of June 1776, the consent of *Thomas Wood* the elder and *Thomas Wood* the younger, or the survivor of them, was required to the due execution of that power, and to this consent two circumstances were made necessary; first, that it should be testified by some writing under their hands and seals; and, secondly, that the facts of their putting their hands and seals to such writing should be attested by two or more witnesses; so that the point in question appears to us to be simply, whether the attestation, written in the indentures of *March* 1788, asserts both these facts; that is, whether the word "sealed" necessarily implies that the parties who put their seals to it, put also their hands to it, or signed it in the presence of the witnesses; which we are of opinion it does not do according to the true interpretation and ordinary sense of the word "sealed." If it were to be determined as a matter of fact, whether the signature of the *Woods* was made in the presence of the same witnesses who attested their having sealed the indenture of *March* 1788, a jury, under all the circumstances to which their attention might be directed, might, perhaps not improperly, presume the affirmative of such question; but as a question of law, we think it must be determined by the true construction of the terms of the attestation; to which, it appears to us, that our consideration must be confined; and we do not think that the signature of *Thomas Wood* and his son is comprehended in the words made use of in the attestation. And we are further of opinion, that the attestation required to constitute a due and effectual execution of the power, ought to make a part of the same transaction with the signing and sealing the writing testifying the assent and approbation of *Thomas Wood* and his son; such being the usual and common way of attesting the execution of all instruments requiring attestation; which, we think, the parties creating the power

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power had in their contemplation, and intended, and not an attestation to be written at a distance of time after all the parties had testified their assent and approbation.

J. HEATH.

S. LAWRENCE.

A. CHAMBRE.

Jan. 23.

SHEPHERD, Demandant; JAMES, Tenant;  
BOUGHTON, Vouchee.

Recovery amended by transposing the christian name of the demandant.

BY mistake the commissioners had reversed the christian name of the demandant, by inserting *William Charles*, instead of *Charles William*. On the motion of *Lens Serjt.* the Court permitted the mistake to be amended.

Jan. 23.

COLLYER, Demandant; —, Tenant; Lord  
CHESTERFIELD, Vouchee.

Recovery amended by inserting the *tithes of Wroxham*, where possession had followed the deed ever since its date, and the tithes appeared to be intended to pass.

IN 1745 the father of the Defendant purchased the manor and estate of *Wroxham*, together with the tithes thereof, of Lord *Chesterfield*, (then tenant in tail), when a recovery was suffered, and from that time the demandant's father, and since his decease, the demandant, had been in possession of the whole of the above property. Upon the motion of *Lens Serjt.*, the Court permitted the recovery to be amended by inserting *the tithes of Wroxham*, upon an affidavit by the demandant (who was not born at the date of the recovery) of the above facts, and of his belief that the tithes were intended to be passed, and that they were included in the deed.

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## STEEL v. BRADFIELD.

Jan. 27.

THE Defendant had given the Plaintiff, whose natural son he was, a note of hand for 100*l.*, money lent, upon the back of which the Plaintiff had made the following memorandum: "I do hereby agree that if the interest is duly paid 2*l.* 10*s.* at the end of six months, and 2*l.* 10*s.* on the 25th of *December*, and so on continually on the 24th of *June* and 25th of *December* during my life, then the note shall be given up." The Defendant had paid all interest, though not with precise punctuality as to the day specified in the indorsement, up to *January* 1811. He paid none in *June* 1811, and was preparing to pay a year's interest in *January* 1812, when the Plaintiff commenced this action upon the note.

Upon a note of hand the payee indorsed that if the interest was paid on stipulated days during her life, the note should be given up. A payment of the interest being omitted, and action commenced on the note, held that the Court had no power to stay proceedings on payment of the interest and costs.

*Pell* Serjt. had in this term obtained, with much difficulty, a rule *nisi* to stay the proceedings upon payment of the year's interest and the costs of the writ, against which

*Lens* Serjt. now shewed cause. If 5*l.* is all that is due in this action, the Defendant has a simple remedy to prevent further expence, by paying that sum into court. If the question be whether it was the intention of this instrument to give the Plaintiff any thing more than an annuity of 5*l.* for her life, that question will be tried by proceeding in the action, wherein the true construction of the instrument will be considered. [The Court observed that this was not a question on the legal interpretation of the contract, according to which, as the condition had not been observed, the Plaintiff must necessarily recover to the full extent of the note, but to their supposed equitable jurisdiction.] The condition  
(and

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(and it must be remarked that this is not enforced by a penalty,) upon which the principal sum is to be given up, is, that the interest shall be at all times regularly paid. If the condition is broken, there is no equity that can restore it. Even in the case of a penal sum with condition for payment by instalments, if one instalment fails, the whole penalty is recoverable.

*Pell, contra*, observed that before the statute of 4 Ann. c. 16. s. 12., the courts of law used to interfere to relieve the obligor of a bond upon payment of the debt, and not of the penalty. He offered a judgment for the sum, with stay of execution so long as the interest should be duly paid: in cases upon judgments entered up on warrants of attorney, this Court, he said, frequently stays execution upon the payment of the instalments stipulated.

MANSFIELD C. J. There have been at least twenty motions in this court since I have sat here, to restrain executions said to be levied against agreement, and upon the shewing cause it has appeared that there has been a failure in payment of the instalments, and the rules have been discharged.

CHAMBER J. There are several cases in this court where a warrant of attorney has been given, with stay of execution if the sum is paid by instalments regularly, and that if failure is made in either of the instalments, then execution shall go for the whole; but the Court have never thought themselves entitled to stay the execution, or reinstate the parties, contrary to their own express agreement.

Rule discharged.

1812.

## BRAGG v. ANDERSON.

Jan. 29.

THIS was an action upon a policy of insurance, at and from *Martinique* and all or any of the *West India* islands to *London*, upon the ship *John Bent*, beginning the adventure upon the goods from the loading thereof on board the ship at the *West Indies*; and it should be lawful for the ship, &c. in that voyage to proceed and sail to and touch and stay at any ports or places whatever, without prejudice to that insurance, at the rate of ten guineas *per cent.*, to return 3*l.* *per cent.* for convoy, or 2*l.* *per cent.* for armed ship or ships, and 4*l.* *per cent.* if she failed before the first of *August*; and by a memorandum at the foot of the policy the insurance was declared to be "On ship." The cause was tried in *London*, before *Mansfield C. J.*, at the sittings after *Michaelmas* term 1811, when the defence was a deviation, it appearing that the ship sailed from *Martinique* for *St. Domingo*, which was much out of her direct course from *Martinique* to *London*, and took in her cargo at *St. Domingo*, and thence sailed for *London*, and was captured on the homeward voyage: it was in proof that at the time of effecting this policy, the ordinary premium of insurance upon a voyage directly from *Martinique* to *London* was ten guineas *per cent.*, while the premium for a voyage direct from *St. Domingo* to *London* was not less than 18 guineas; some premium would also be required to cover the risk from *Martinique* to *St. Domingo*. The jury found a verdict for the Plaintiff, subject to the point reserved, whether the terms of the policy warranted the course which the vessel had taken.

A policy at and from *Martinique* and all and every *West India* islands, warrants a course from *Martinique* to islands not in the homeward voyage.



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*Pell* Serjt. now moved to set aside the verdict for the Plaintiff, and enter a verdict for the Defendant: he observed that there had been an inception of the voyage from *Martinique*, after which, according to the doctrine of the Court in *Gairdner v. Senhouse*, ante, 3. 16., the vessel could not go to other islands not in the course of her direct homeward voyage. He admitted that in that case there was an exception of *Jamaica* and *St. Domingo*, but that made no difference; and, with that exception, the words there were as general as here, and these words must be restricted in their construction to such islands as lay in the direct course of the homeward voyage from *Martinique*.

MANSFIELD C. J. There is no getting over these words; instead of all, you must substitute the words some of the *West India* islands, such as lie between *Martinique* and *London*, you would make quite a new engagement. Here, though from the difference of premium, it is possible the underwriters may not have attended to the terms of this contract, and I think it not impossible that the underwriter may have signed the contract without having sufficiently considered the nature of the risk he was to run, yet we cannot make new contracts for persons. The case of *Gairdner v. Senhouse* is very distinguishable from this.

HEATH J. The construction contended for would make an entirely new contract.

Rule refused.

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## ANDRIONI v. MORGAN.

Jan. 31.

**SHEPHERD** Serjt. had obtained a rule *nisi* to discharge the Defendant out of custody upon filing common bail, upon the ground that the cause of action was a bill of exchange sworn to be due to *Augusti Andrioni*, who was a foreigner resident at *Dresden*; and the deponent, who could know nothing but from instructions transmitted to him here, took on himself confidently and positively to swear that the Defendant was so indebted, and that no tender had been made to the Plaintiff in notes of the Governor and Company of the Bank of *England*, which it was impossible he, residing here, should know; and it did not appear on the face of the affidavit what relation the deponent bore to the Plaintiff.

It is no objection to an affidavit to hold to bail, which states that the Defendant is indebted, and denies a tender in Bank-notes, that the Plaintiff resides in a foreign country, and that it does not appear how the deponent could know these facts.

**Lens** Serjt. shewed cause. The affidavit is sufficiently precise that the debt is due on a bill of exchange, and that no tender has been made. Since the stat. 43 G. 3. c. 44. s. 2., it is necessary, in case of any application to the Court to discharge the Defendant on account of any supposed defect in the affidavit to hold to bail, that the Defendant should shew proof by affidavit that tender has been made, wholly or in part, in notes of the Bank of *England*.

**HEATH J.** The case of *Pieters v. Luytjes*, 1 Bos. & Pull. 1., is directly in point. The Plaintiff resided in *Holland*, and the deponent was resident here; and the same objection was expressly taken, and the Court say it is not necessary for the connection between the deponent and the Plaintiff to appear on the face of the affidavit.

The rest of the Court concurring,

The rule was discharged.

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Feb. 3.

BECK v. SARGENT.

The award of an umpire is not vitiated by the two arbitrators who were *functi officio* joining in it.

Nor by a stranger joining.

If the bond be that if arbitrators do not make their award by the day named, then to abide the award of an umpire to be chosen by the arbitrators, the time for the arbitrators to appoint an umpire commences when the time for their making their award expires.

*BEST* Serjt. had obtained a rule *nisi* to set aside an award in this case, upon two grounds; one, that the parties had not been heard, which was answered by the affidavits; 2. that the submission was, "so that the two arbitrators should make their award before or on the 21st day of *June*; but if no award should be made before or on that day, then that the parties should observe the award of an umpire to be chosen by the arbitrators, so as such umpirage should be made before the 28th of *June*." The arbitrators met, and did not make their award, nor choose an umpire, before or on the 21st of *June*; but they appointed an umpire before the 28th of *June*, and the umpire, together with the arbitrators, before the 28th of *June* made their joint award in the following terms: "We the undersigned arbitrators and umpire, do award," &c.; and he contended, 1. that the umpire was not chosen in due time; 2. that the award was void, because made by persons who had no authority.

*Shepherd* Serjt. shewed cause against this rule, contending there was no foundation for the objections.

*Lens* Serjt., in the absence of *Best*, in support of this rule, urged that the arbitrators on the 21st of *June* were *functi officio*, and could not afterwards appoint an effective umpire; or if they could, they could only do it instantly at the expiration of that day, and not at any indefinite time between that day and the 28th; 2. that the award of three is necessarily the award of the majority of them, who might happen to consist of the two arbitrators in opposition to the opinion of the umpire,

and so no award of his; and at all events it is not the award of the umpire alone.

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MANSFIELD C. J. Before or upon the 21st day of *June*, until the last moment of that day, the arbitrators have power to agree in award, if they do not in the course of that day agree in award, then they have power to appoint an umpire; but until they fail to make their award on the 21st day of *June*, the power to appoint an umpire does not begin. As to the other point, what the arbitrators do in making the award is nothing, the award is in law the award of the umpire alone: it is no more than if mere strangers had joined in the award, which could not vitiate.

HEATH J. It has been decided in very old cases, that the circumstance of another joining with the arbitrator in making an award does not vitiate.

Rule discharged with costs.

# DE TASTET and Others v. TAYLOR.

Feb. 4.

THIS was an action on a policy of insurance, which was tried at *Guildhall*, before *Mansfield C. J.*, at the sittings after *Michaelmas* term 1811, when a verdict was found for the Plaintiffs for 200*l.*, subject to the opinion of the Court on the following case: The policy, dated the 10th day of *May* 1810, was effected by the Plaintiffs, as well in their own name as for and in the name of all or any person to whom the same should belong, on 50 hogheads of sugar, on board the *Jupiter*, though the neutrals become enemies before action brought, the broker may, upon a loss incurred, maintain an action against the underwriters to recover the value of the joint interests of the three.

If a merchant, *British* by domicile, and two neutral merchants, his partners, export goods from *London* to an hostile port under a licence granted to their broker on behalf of several *British* merchants, and insure, al-

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from *London* to *Archangel*, and any port or ports, place or places, whatsoever and wheresoever, on the continent, without the *Baltic*, backwards and forwards, until the goods were safely delivered in the houses or warehouses of the consignee, with or without simulated papers, including the risk of craft in landing, backwards and forwards, at 12 guineas *per cent.*, to return 4*l.* *per cent.* for arrival. The first count of the declaration averred the interest to be in *John Daniel Stockfleth*, and the second in *Martin Stockfleth*, *Paul Menard*, and *John Daniel Stockfleth*. The ship, with the goods on board, sailed from *London* on or about the 18th day of *May* 1810, bound for *Archangel*, arrived thither, and, previous to the cargo being safely delivered into the houses or warehouses of the consignees, the same was lost by capture and confiscation. The Plaintiffs were and had been many years merchants resident in *London*. In *April* 1810 they purchased, by the directions of *John Daniel Stockfleth*, who then was and ever since had been a domiciled merchant, resident in *London*, 50 hogheads of sugar, and shipped the same in a general ship, a neutral, called the *Jupiter*, from *London* for *Archangel*. Messrs. *Cassendick* and *Hentz*, of *London*, were the ship's brokers, and the king, on their "petition, on behalf of several *British* merchants, granted licence to Messrs. *Cassendick* and *Hentz*, on behalf of several *British* merchants, and permitted them, to load and export on board the *Jupiter*, *D. Gaedjen* master, a cargo of wine, brandy, and such goods as were permitted by law to be exported from *London* to *Archangel*, and did thereby direct the commanders of all his ships of war and privateers not to interrupt the said vessel, but to suffer her to proceed." The case further stated, that sugar was permitted by law to be exported. That the tonnage of the vessel and the time of her clearance was regularly indorsed on the licence, and the other requisites thereof complied with.

That the purchase of the sugar in question was made by the said *John Daniel Stockfleth*, to be shipped on the joint account of himself and *Martin Stockfleth* and *Paul Menard*, then and still of *Hamburg*, merchants. That in or about *January 1811*, *Hamburg* was annexed to the *French* empire, and had thenceforth continued annexed thereto; and that *John Daniel Stockfleth* was indebted to the Plaintiffs in a sum beyond the amount recoverable upon the policy in question. The question for the opinion of the Court was, whether the Plaintiffs were entitled to recover: if so, the verdict was to stand; if not, a nonsuit was to be entered.

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*Lens Serjt.*, for the Plaintiff, after adverting to the facts, contended that as *Hamburg* must be taken to have been in amity with this country, or at least not under the dominion of the *French* at the time of the loss incurred, which was previous to *January 1811*, the date of its annexation to the *French* empire, no question would arise touching the insurance of enemy's property. The only questions were, first, whether the licence granted to Messrs. *Castendick* and *Hentz*, on the behalf of several *British* merchants, might be extended to the joint proprietors of goods, one of whom only, at the time when such licence was granted, was a merchant domiciled in this country, the others being then and still foreigners resident at *Hamburg*; secondly, whether those foreign proprietors having become alien enemies at the time of the action brought, the Plaintiffs can sue on their behalf. Upon the first point he insisted that the case of *Usparicha v. Noble*, 13 *East*, 332., was an authority to shew that these licences have received a construction much more extensive than his argument required; it was said in that case, that the crown might exempt any persons, or any branch of commerce from the disabilities arising out of a state of war; and its licence for such purpose ought to

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receive the most liberal construction. It was accordingly held that the Plaintiff, a *Spaniard*, domiciled here in time of war, to whom a licence had been granted to ship goods to certain ports in *Spain*, might insure goods shipped by him as agent for two *Spaniards* resident in the hostile country, and maintain an action upon such insurance on their behalf; so that, in this case, if it had been found by the jury, that *Hamburg* was in the hands of the *French* at the time when the licence was granted, and that *J. D. Stockfleth* had no interest in these goods, still, according to *Usparicha v. Noble*, the Plaintiff would have been entitled to recover. It is found, however, that *J. D. Stockfleth* was partly interested in this adventure, which accounts for the introduction of the terms "*British* merchants" into the licence, and is sufficient to satisfy those terms; and there was no need to have the licence directed to him specifically by name. Secondly, he contended that the other proprietors having become alien enemies since the licence, would not prevent the Plaintiffs from suing on their behalf, as it had been already shewn by the authority of *Usparicha v. Noble*, that they were protected by the licence; and although it might be admitted, that the king could not by his licence remove the personal disability of a trader in respect of suit, so as to enable him to sue in his own name, yet it has been decided in *Kensington v. Inglis*, 8 East, 273., that in such case a *British* agent may maintain an action on behalf of an alien enemy.

*Shepherd Serjt.*, *contra*, admitted, that according to the case of the *Luna*, 1. Edwards, 190., it might perhaps be considered that *Hamburg*, although under the temporary dominion of the *French*, was not a hostile state before *January* 1812, when it was annexed to the *French* empire. He contended, however, upon the facts of the case, that this was an insurance effected by *J. D. Stockfleth*,

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*festh*, for himself and two aliens, who since that insurrection, but before the action brought, had become alien enemies. The question is, if the Plaintiffs can recover on their behalf. [*Mansfield* C. J. I thought it had been settled by the cases, that the licence takes away the hostile character of the parties licensed.] It may be so as to legalizing the adventure, and, therefore, whatever is necessary for that purpose the licence will extend to. It will, therefore, protect all those who are necessary parties to such an adventure, such as the consignees abroad, who, *quoad hoc*, will be adopted by the licence, and excepted from the class of enemies; inasmuch as the nature of the adventure requires that there should be a consignee, as well as a confignor. But these persons are not subjects of, nor resident in the hostile country to which the licence permits the goods to be exported; and it is a very different consideration, whether the persons to whom the licence is granted as *British* merchants shall thereby be at liberty to confer such an adoption upon persons who are neither *British* merchants, nor even resident in this country, not by the consignment to them abroad, but by admitting them as partners only in the same adventure. If this can be done, there is nothing to prevent two *French* merchants resident at *Paris* from being joined as partners with the *British* merchants; and thus finding a protection for their trade. [*Heath* J. The two *Hamburgers* required no licence; they were neutrals, and might export goods from this country to *Archangel* without a licence. *J. D. Stockfesth*, who alone wanted a licence, had one. *Mansfield* C. J. The licence was to a *British* merchant, and *J. D. Stockfesth*, who shipped the goods, and was interested in them, was a *British* merchant, and thus exactly within the terms of the licence; unless it contain any expression to restrain it to such goods as he was solely interested in.] The licence must either be restrained to *British* merchants,



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chants, or, if extended beyond that, it must be extended as well to alien enemies as alien friends. A licence to *A. B.* and others has indeed been extended to all others of whatsoever description; but there may be extremely good reason in many cases to confine the licence, as is done in this case, to *British* merchants only. In the report of *Ussaricha v. Noble*, the terms of the licence do not appear: but unless it contained the terms *British* merchants, the case has no application. Perhaps where a *British* merchant, under a licence to *British* merchants only, is engaged with alien merchants as partners in the adventure, and insures his interest separately, if a loss happens he may be entitled to recover to the amount of his own separate interests, but not so where he makes a joint insurance upon a joint adventure, which in part is illegal; for the contract which was made joint by the party, cannot be severed, so as to be good *pro tanto*, but must either be legal altogether or void altogether. 3 *Bos. & Pull.* 183., *McConnell v. Hector*; it was held, that a petition founded on a debt due to *A.*, a *British* merchant, and to *B.* and *C.*, also *British* merchants, but resident and carrying on trade in an hostile country, was insufficient to support a commission of bankrupt. In like manner, here, though *J. D. Stockfleth* would be protected by the licence, if he were solely interested in the adventure, yet as the *Hamburgers* are not protected by the licence, his interest is contaminated by the partnership with them, and nothing can be recovered on this policy, because it is effected on their joint interest.

*Lens* in reply. If it were material to the present question, it is clearly legal for a neutral to come and purchase goods here, and export them to an enemy's country. No licence is required in such a case, either by the law of nations, or by our own navigation laws.

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The Defendant's argument is in direct opposition to the cases of *Kensington v. Inglis*, and *Ussaricha v. Noble*, and is unsupported by any authority. If, instead of the words *British* merchants, the name of *J. D. Stockfleth* had been found in the licence, this would have been precisely the case of *Ussaricha v. Noble*: the Defendant is reduced to contend, that although a licence to *J. D. Stockfleth* by name would have sanctioned the joint adventure, yet a licence to him on behalf of *British* merchants, shall confine the adventure to the goods of *British* merchants only. *Ussaricha* was the sole purchaser, as *J. D. Stockfleth* was in this case; but *Ussaricha* had no interest in the goods; that case, therefore, is infinitely stronger: for here *J. D. Stockfleth* retains a beneficial interest. The terms of that licence do not appear, but it is improbable that *Ussaricha*, who had no connection with any *British* merchant, should have obtained a licence on behalf of himself and any *British* merchants. [*Mansfield C. J.* From the language of Lord *Ellenborough* in 13 *East*, 340., it appears, that licence was to *Ussaricha*, on behalf of himself and others.] If this licence would, as is admitted, protect the *Russian* consignee, an alien enemy, *a fortiori*, it will protect a neutral consignee. Lord *Ellenborough* explains the effect of these licences to be, that they take away the effect of war, and render that legal for all the parties concerned, which would be legal if there were no war. The argument which would exclude neutrals from the benefit of the licence because they are not *British* merchants, is contrary to the whole current of authorities. *Macconnell v. Hector* is irrelevant: the principle of that case is, that no one could become a petitioning creditor who was not competent to recover the debt, suing as a plaintiff on the record in an action at law. The licence to trade removes the incapacity of trading, but does not purport to remove from an alien enemy the disability

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to sue on the record. Even if *J. D. Stockfleth* had possessed no interest in the goods, these Plaintiffs must have succeeded, within the authority of *Usparicha v. Noble*. Nothing in the terms of the licence restricts the protection to such goods as *British* merchants alone are interested in.

MANSFIELD C. J. The objection that these *Hamburgers* are alien enemies may be wholly laid aside; for the case of *Kemfington v. Inglis* has decided, that if that objection cannot be raised against the Plaintiff on the record, the agent may sue in trust for an alien enemy who is licensed. It appears that the terms of the licence to *Usparicha* being general, the Court of King's Bench adopted the construction, that he, having licence to export for the benefit of himself or others, might export the goods of any person whatever, and was not bound to export goods of his own, as in *Defflis v. Parry*, 3 *Bos. & Pull.* 3. The single question in the present case, is that which arises upon the joint interest of the two persons, who are not *British* subjects. The only difference, however, between this case and *Usparicha v. Noble* is, that there, though the goods went to foreigners, yet the price of them came in part to the *British* merchant, of whom they were bought, although he divided the benefit of the trade with aliens. In the other case a *Spanish* consignee had the whole profit of the export trade. The object of these licences is to encourage the exportation of certain goods from this country, the exportation of which is considered as a national benefit. We therefore think, that *J. D. Stockfleth*, being himself interested, and the sole purchaser, (and Lord *Ellenborough's* doctrine would carry it much further,) is covered by this licence, and that he does not exceed the terms of his licence by reason of the joint interest which is in these *Hamburgers*, and that there is

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consequently no objection to the insurance. In *Upparicha v. Noble*, the great objection contended for, was, that the goods were to go to *Spanish* subjects, who were alien enemies; but that was held to be of no force, for that it must always be understood, when a licence to trade with an enemy was granted, that the enemy's subjects were to receive the goods, as we determined in this court on a voyage to *Russia* (a). And in consonance to the general policy of the state, which is to encourage the exportation of these goods from *England*, we must hold, upon the fair construction of this licence, that it is no objection that the property partly belongs to these *Hamburgers*, especially as *J. D. Stockfleth* bought the goods and shipped them.

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HEATH J. I am of the same opinion. I think if the voyage had been successful, *J. D. Stockfleth* would have been a trustee for these *Hamburgers* as to their share in the adventure. It is an advantage to this country, that the capital of foreigners should be invested in *English* produce: on the other hand it would be a disadvantage to us, if *English* capital were to go abroad for the purpose of effecting the desired exportation. I think, therefore, that the Plaintiff is entitled to recover.

Judgment for the Plaintiff.

(a) *Payle v. Bourdillon*, ante, p. 344. And see *Morgan v. Quid*, ante, p. 354.

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GURNEY and Others, Assignees of BLACKBURN  
and BONNER, Bankrupts, v. SHARP and  
Others.

A broker purchasing goods for his principals, without their knowledge, adds to the terms of purchase which the principals had agreed to, a guaranty by himself of their bills. The goods were delivered to the broker; the principals became bankrupts. Held that the broker could neither detain the goods as upon a stoppage *in transitu*, nor had any lien on them for the money he had paid on his guaranty.

THIS was an action of trover brought to recover a quantity of hemp, which came on to be tried at the sittings at *Guildhall, London*, after last *Trinity* term. before *Mansfield C. J.*, when a verdict was taken for the Plaintiffs for 2500*l.*, subject to the opinion of the Court on the following case. *Blackburn* and *Bonner* were merchants residing at *Lynn* in *Norfolk*; the Defendants were *Russia* brokers residing in *London*, and as such, occasionally employed by *Blackburn* and *Bonner*. By letter dated the 14th of *December* 1810, *Blackburn* and *Bonner*, in reply to a letter previously written to them by the brokers about the price of hemp, wrote the Defendants as follows: "If you can purchase us a parcel of new  
" *Riga Rhine*, of good quality, and such as you approve  
" on inspection, of 20 to 30 tons, at 73*l.* per ton, pay-  
" ment by our acceptance at 6 months, we wish you to do  
" it directly." *Blackburn* and *Bonner*, by letter dated the 15th of *December*, directed the Defendants to forward one ton of the hemp, when purchased, to *Mr. Minet of Ely*, on account of *Blackburn* and *Bonner*. On the 18th of *December* the Defendants purchased of *Messrs. Solly and Sons* 28 tons of hemp, on account of *Blackburn* and *Bonner*, and by letter dated the 20th of the same month, addressed to them, wrote as follows: "The price of  
" *Rhine* hemp is called 74*l.* per ton; but we bought  
" you, on the 18th instant, about 28 tons of new *Rhine*  
" hemp, from *Messrs. Isaac Solly and Sons*, at 73*l.* per  
" ton, payment by your acceptance at 6 months' date,  
" allowing  $\frac{1}{4}$  discount thereon, and 14 days for the  
" deli-

" delivery. We shall receive this on your account,  
 " and, as desired, send one ton of it to Mr. *J. Minet*,  
 " *Ely, Cambridgeshire, per waggon.*" On the 22d of  
*December*, *Solly* and Sons delivered the hemp to the  
 Defendants on account of *Blackburn* and *Bonner*. On  
 the 24th, *Blackburn* and *Bonner* wrote to the Defendants  
 as follow: " We have been duly favoured with your  
 " esteemed of the 20th current, and observe thereby  
 " you have purchased for our account about 28 tons of  
 " new *Rhine* hemp, at 73*l. per* ton, six months, at  $\frac{1}{4}$  *per*  
 " cent., which we approve; and if you can buy us 20  
 " to 30 tons more on the same terms, we wish you to  
 " do it." On the 24th of *December* the Defendants  
 sent one ton of hemp to Mr. *Minet*, at *Ely*, as directed;  
 and on the 31st sent *Blackburn* and *Bonner* the receipt  
 for its delivery, and for which ton of hemp Mr. *Minet*  
 afterwards paid *Blackburn* and *Bonner*. On the 4th of  
*January* 1811 the Defendants forwarded to *Blackburn*  
 and *Bonner* the invoice as follows:

|                                                            |   |                        |   |            |
|------------------------------------------------------------|---|------------------------|---|------------|
| Messrs. <i>Blackburn</i> and <i>Bonner</i> , <i>Lynn</i> . |   | Bought of <i>Isaac</i> |   |            |
| <i>Solly</i> and Sons, at 6 months' credit.                |   | , £. s. d.             |   |            |
| Hemp, &c.                                                  | - | -                      | - | 2089 19 8  |
| Discount, $\frac{1}{4}$                                    | - | -                      | - | 26 2 5     |
|                                                            |   |                        |   | <hr/>      |
|                                                            |   |                        |   | £2063 17 3 |
|                                                            |   |                        |   | <hr/>      |

This invoice was accompanied with a bill drawn by  
*Solly* and Sons on *Blackburn* and *Bonner* for the amount,  
 which they sent back, duly accepted, to the Defendants,  
 for *Solly* and Sons, and which was afterwards delivered  
 to *Solly* and Sons. The Defendants at the time of sale  
 guaranteed the payment to Messrs. *Solly* and Sons for  
 a commission paid them by *Solly* and Sons, without  
 which guaranty *Solly* and Sons would not have sold the  
 hemp, but such facts were not made known by the  
 Defendants to *Blackburn* and *Bonner*. On the 15th of  
*March* last *Blackburn* and *Bonner* became bankrupts, and  
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the Plaintiffs were chosen assignees of their estate and effects. *Solly* and Sons proved under the commission their said debt of 2063*l.* 17*s.* 3*d.*, for which, they swore, they held no security except the said bill accepted by the bankrupts, and the guaranty of the said Defendants, since which proof the Defendants had paid *Solly* and Sons the amount of such acceptance in discharge of their guarantee. The Plaintiffs, as assignees of the bankrupts, had demanded the remainder of the hemp from the Defendants, and had offered to pay them whatever charges were due to them on account thereof; but the Defendants had refused to deliver it to the Plaintiffs, insisting they were entitled to hold it in discharge of their guaranty given to *Solly* and Sons. The question for the opinion of the Court was, if the Plaintiffs were entitled to recover; if they were, the verdict was to stand for 1990*l.* 17*s.* 3*d.* If not, a nonsuit to be entered.

*Pell* Serjt. for the Plaintiffs, after opening the case, was stopped by the Court, who called upon *Lens* Serjt. to support the Defendant's claim. (He observed that the guaranty was given without any notice to the bankrupts, (the vendees,) and enquired therefore how they could be affected by it.

*Lens* admitted that the Defendants could not place the bankrupts in a worse situation by any act done without their knowledge and approbation; but contended that they were not in a worse situation by the Defendants retaining the goods which had come into their hands, and the price of which they had paid, until the bankrupts made good their failure. The bankrupts could never have obtained the hemp but through the purchase of the Defendants; for it is stated in the case that *Solly* and Co. would not have sold it, without their guaranty :

guaranty : if therefore they claim the benefit of taking the purchase out of the Defendants' hands, it is but reasonable that it should be upon the terms of paying the Defendants' price, who are the meritorious parties to this contract. Unless it can be shewn that the payment by them to *Solly* and Co. was a payment in their own wrong, and not for the benefit of the bankrupts, they will be entitled to stand in the place of the vendors, and may either stop the goods *in transitu*, or retain them for their lien for the price. The assignees will still have the benefit of the purchase.

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 v.  
 SHARP.

MANSFIELD C. J. The sale was perfectly complete, the bill accepted, and the hemp delivered to the Defendants for the use of the bankrupts. It was a very unwise contract on their part, and I am very sorry for it ; but the goods were sold and delivered for the bankrupts, and the possession of the Defendants was their possession. It was a delivery to the bankrupts. There is no room for any stoppage *in transitu* ; the goods are arrived at the place of delivery, into the possession of the bankrupts, for which reason also no lien can arise.

*Per Curiam,*

Judgment for the Plaintiff.



1812.

Feb. 4.

## DE GAMINDE v. FIGOU.

Upon an action against the underwriter for a loss, the underwriter cannot set off the premiums, although they have never been paid, unless he can make it appear that the state of the relative accounts between assured, broker, and underwriter, is such as to take the case out of the ordinary rule, which is, that the receipt of the underwriter for the premium is conclusive evidence for the assured that he has paid the premium to the underwriter.

IN this case the declaration contained a count upon a policy of assurance, at and from *Alicante* to a port of discharge in *Great Britain*, upon goods by ship or ships. The interest was averred to be in the Plaintiff, and the loss to be by capture. There were also common counts for money paid and expended, money had and received, and on an account stated. The plea was the general issue, accompanied with notice of set-off. This cause was tried before *Mansfield C. J.* and a common jury, at the sittings at *Guildhall* after *Trinity* term 1811, when a verdict was found for the Plaintiff, with damages 32*l.* 18*s.*, subject to the opinion of the Court on the following case. The Defendant subscribed the policy for 300*l.* The goods were shipped, as in the declaration mentioned, on board the ships *Discado* and *Louisa*, and were the property of the Plaintiff. In the course of the voyage from *Alicante* to *Great Britain*, the *Discado* was captured, and recaptured. The *Louisa* sailed with convoy and arrived, whereupon a return of premium became payable by the terms of the policy. There was upon the whole insurance a short interest, whereupon also a return of premium became payable. The premium in respect of the Defendant's subscription amounted to 31*l.* 10*s.* The amount of the loss by salvage paid to the recaptors, and of the returns of premium for convoy and short interest, was agreed to be 10*l.* 19*s.* 4*d.* per cent., being 32*l.* 18*s.* on the Defendant's subscription. The Defendant claimed under the following circumstances to set off the premium stated to have been paid to him: The insurance was effected by Messrs. *Wagstaffs*, who were insurance brokers, by the order of Messrs. *Larrazabal*, *Menoyo*, and *Trotiager*, merchants in *London*,

*London*, who received the orders for, and caused the insurance to be effected. The premium mentioned in the policy to have been received by the Defendant, was not paid to him, but he debited Messrs. *Wagstaffs*, the brokers, with the amount in account, and they in their account gave him credit for the premium, according to the usual mode of dealing between brokers and underwriters. The brokers in the same manner debited Messrs. *Larranabal, Menoyo, and Co.* with the premiums, but they had not been paid the amount thereof. Messrs. *Larrazabal, Menoyo, and Co.* in like manner debited the Plaintiff with the same in their account with him, but they had not been paid the same. At the time when the policy was effected, no communication was made to the Defendant that the Plaintiff was in any manner interested or concerned in the insurance. Messrs. *Wagstaffs*, the brokers, and Messrs. *Larrazabal, Menoyo, and Co.*, had both stopped payment. The question for the opinion of the Court was, whether the Defendant could set off the amount of the premiums due to him as above stated against the claim of the Plaintiff in this action. If the Court should be of opinion that he could, a verdict was to be entered for the Plaintiff for 1*l.* 8*s.* : if not, the verdict was to stand.

This case was argued by *Lens Serjt.* (in the absence of *Best Serjt.*) for the Plaintiff, who contended that there was nothing to take this case out of the ordinary course of dealing between broker and underwriter, so as to enable the underwriter to maintain his set-off against the assured.

*Shepherd Serjt.*, *contra*, cited *Airry v. Bland*, 1 *Park*, 6 *Ed.* 34. ; but observed that that case depended on a special contract between the broker and the underwriter, and therefore did not govern this case. He observed,

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that

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that if it had appeared on the face of this case that the underwriter had paid the losses and returns of premium to the assured through the medium of premiums retained in the hands of the broker, it might have sufficed; but it did not appear upon this case how the accounts stood between the parties. He also cited *Shee v. Clarkson*, 12 *East*, 507.

**MANSFIELD C. J.** That case depended upon the question, whether by the terms subsisting between the broker and the assured, the broker had authority to receive the short interest and losses. The assured may take the policy out of the broker's hands, and insist upon receiving the losses. The Court must there have proceeded on the ground that the broker had authority to receive the losses, for he held the policies.

**HEATH J.** That case has nothing to do with this. When the assured is admitted to have paid the premium, it is, as between the assured and the underwriter, actually paid. The admission of the receipt of the premium is an admission that it shall be allowed by the underwriter in account, and how that account stands between these parties we do not know, for it is not stated in this case, but it must be allowed in account by the broker to the underwriter.

Judgment for the Plaintiff.

1812.

## GRAHAM v. STURT (a).

Feb. 6.

**L**ENS Serjt. opposed the justification of bail in this case, on the ground that one of them (*John Calcraft Esq.*, of *Rempstone Hall*, in the parish of *Corfe Castle*, in the county of *Dorset*.) was a member of parliament, and that no privileged person could be bail on account of the difficulty of proceeding against him. The only authority he cited was in 1st *Siderfin*, p. 68., where the tipstaff in chancery was put in as bail, and objected to, as being privileged, which objection the Court there held good.

It is a sufficient objection to bail, that he hath privilege of parliament, whereby the plaintiff may be delayed in obtaining payment from him.

*Per Curiam.* We think he ought not to be bail from the difficulty of proceeding against him; the justification, therefore, must be disallowed. But they gave time to put in another.

(a) *Ex relatione Mri. Watlington.*

BAXTER, Demandant; BAXTER, Tenant; NEW-MAN, Vouchee.

Feb. 7.

**B**LOSSET Serjt. moved to amend a recovery which had been suffered of lands in *Weston Turville*, by inserting the parish of *Aylebury*, upon an affidavit that they were omitted by mistake, but it appeared that the mistake in some sort affected the deed declaring the uses, as well as the recovery. The land, the title whereof he sought to perfect, was a close called *Plowed Hays*,

Recovery amended by insertion of a parish in which a certain close lay, the close being named in the deed declaring the uses, but the parish being no otherwise named

in the deed than by reference to a map in the margin, on which the name of the close and parish were marked together.

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parcel of a larger estate. In the margin of the deed to lead the uses was a map of the whole estate, to which the deed referred, and upon the site of the several closes in the map were written their respective names. Upon this was written "*Plowed Hayes*, in the parish of *Aylebury*." In the parcels of the deed all the closes were enumerated by name, and amongst others *Plowed Hayes* and *Meophams*, and after the names of the fields ought to have followed these words, "which closes called *Plowed Hayes* and *Meophams* are situate in the parish of *Aylebury*," and all which other closes except *Plowed Hayes* and *Meophams* are situate in the parish of *Weston Turville*; but the former clause was erroneously omitted, so that the deed stood thus; "and all which other closes except *Plowed Hayes* and *Meophams* are situate in the parish of *Weston Turville*," and no parish was by the context of the deed assigned for *Plowed Hayes* and *Meophams*. It was further sworn that *Plowed Hayes* was in the parish of *Aylebury*, and that it was intended to pass.

*The Court* permitted the amendment.

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(IN THE EXCHEQUER-CHAMBER.)

Feb. 8.

FURLONGE v. RUCKER.

Interest allowed on affirmation of a judgment on a contract to make good to the acceptor of a bill so much money as the dividends of a bankrupt's estate should fall short of the amount of the bill.

**READER** moved that upon affirmation in error of the judgment which had been obtained below in this case, interest might be computed on the amount of the verdict. The action below was *assumpsit* on the following instrument: Nov. 26, 1801. Messrs. *Rucker*, Having immediate occasion for 500*l.*, you will oblige me by accepting my draft at 60 days for that sum; and in case that upon the settlement of *Weinbolt's* affairs  
more

more than that sum shall be coming to Messrs. *W. Furlonge* and Sons, of *Mountferrat*, on account of their demand, you will then be pleased to carry such surplus to their credit; but in case that less than the sum of 500*l.* shall be coming to them, then I do hereby engage to make good the difference to you immediately. (Signed) *Wm. Furlonge, jun.* In consequence of that solicitation, the Defendant in error accepted the bill of the Plaintiff in error at 60 days' sight of the same date for 500*l.* The jury gave a verdict for 501*l.* 14*s.* 7*d.*, being the amount of the sum due to the Plaintiff below for principal and interest, after deducting therefrom all the amount of the dividends received from *Weinholt's* effects.

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RUCKER.

MANSFIELD C. J. at first inclined to think it was a mere loan of money, without any agreement for interest.

But HEATH J. observed, that in a case from *Liverpool*, where payment was to be made by a bill at two months, interest had been allowed.

MACDONALD C. B. thought he might be considered as having paid the money on the bill, and that this was only a circuitous way of reimbursement.

Rule absolute to compute interest.

1812.

Feb. 10.

BOOTH v. DRUCE.

A concession to the grantor of an annuity of a greater facility of redemption, made at a time subsequent to the original grant of the annuity and enrolment of memorial, needs not to be memorialized.

**SHEPHERD** Serjt. on the first day of this term obtained a rule *nisi* that the warrant of attorney given to secure an annuity of 69*l.* *per annum* might be set aside, upon an affidavit that at the time of granting the annuity it was agreed between the parties, that the annuity should be redeemable upon repayment of the sum of 500*l.*, the same sum in consideration of which it had been granted, by instalments of 100*l.* at a time; and that upon payment of each instalment, one fifth part of the annuity should cease, and that there was no mention of this agreement for redemption by instalments in the memorial which had been inrolled; he also moved that the Plaintiff might pay the costs of this application.

**Vaughan** Serjt. now shewed cause against this rule upon affidavits, which stated that there was contained in the annuity deeds executed immediately at the time of granting the annuity, a proviso for redemption upon repayment of 500*l.*, and that that proviso was noticed in the memorial, but not the agreement now stated; but that some hours after the deeds had been executed, and the memorial of the transaction, such as it then subsisted, had been inrolled, the Plaintiff, upon the Defendant's request, indulgently signed an agreement to the following effect: "I, who have this day purchased an annuity of 69*l.* for 500*l.*, redeemable for 500*l.* at one month's notice, hereby agree that it may be redeemed by instalments of 100*l.* at a time."

**Shepherd**, in support of his rule, contended that this case was similar to a case of *Sawyer v. Bunce*, where it

was held, that a subsequent transaction must be memorialized.

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BUNCE.

MANSFIELD C. J. The very terms of the paper answer this application; for they speak of the Plaintiff having purchased, referring to this as to a completed transaction, therefore it need not be memorialized. I take it for granted, that in *Sawyer v. Bunce* it was found to be a part of the original transaction.

Rule discharged (a).

(a) *Chambre J.* was absent sitting on a special commission for the trial of certain traitors taken in arms.

JODDREL v. ———.

Feb. 11.

THE Defendant's attorney had obtained, and served upon the Plaintiff's attorney, a summons, in order to obtaining a Judge's order for changing the venue, upon which the Plaintiff's attorney indorsed his consent, but neither party ever attended before the Judge, nor had the order been drawn up: after the Defendant's attorney had obtained all the benefit which he wanted from the order, he proceeded in direct breach of good faith, as if no such summons had been served: and upon an application to the Court upon this subject, no relief was granted him, the Court holding that unless the order is regularly drawn up and served, the consent is of no avail; but that the parties may proceed as if no such summons had been taken out.

A consent indorsed on a Judge's summons binds neither party unless the order be drawn up and served pursuant thereto.



1812.

Feb. 12.

GRIMSTONE v. BELL.

The Court will relieve a party from the terms of filing no-bill in equity, if the evidence of an answer in equity is necessary to attain the justice of the case.

THIS was an action of *quare impedit*. The counsel who advised upon the cause, finding that in the pleadings the Defendant made title to the advowson as appendant to his manor, and seeing reason to advise him to state his title, as to an advowson in gross, directed him to move to put off the trial for the sake of obtaining time to amend the pleas, and of discovering evidence of certain facts material for his defence, for which purpose it was expedient that he should file a bill in equity for a discovery: the motion was accordingly made at the *York* assizes, and the event of it was, that the parties agreed to refer the cause by an order of *nisi prius*: but the defendant's counsel did not advert to the fact that the order of *nisi prius* was obtained upon the usual terms, contained in a printed form, of, amongst others, filing no bill in equity. The Defendant having afterwards filed his bill for a discovery, found out that he was obnoxious to process of attachment for a contempt, in consequence of which

*Pell* Serjt. now moved to amend the order of *nisi prius*, and rule of Court made in pursuance thereof, by striking out the words "and also consenting not to bring any writ of error or file any bill in equity."

*Shepherd* Serjt. opposed this motion in the first instance, upon the ground that it would enable the Defendant to get over the ensuing *York* assizes.

MANS-

MANSFIELD C. J. If it be necessary for the Defendant to have evidence by the answer of the Defendant in equity, before he can with safety proceed to trial, the trial ought to be postponed till after the answer is put in. Neither is this the sort of bill in equity which the rule of Court contemplates, and which means a bill filed to postpone the payment of a debt, or for other purposes of vexatious delay. The Court granted a rule *nisi*.

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BELL.

On this day *Shepherd*, admitting that they could not withstand this application, the Court made the

Rule absolute.

SAWBRIDGE v. COXWELL.

Feb. 12.

ON SLOW Serjt. obtained, on a former day, a rule *nisi* calling upon the Plaintiff to shew cause, why the costs allowed to the Plaintiff should not be restricted to the costs of the action up to the 24th of *October*, the Plaintiff having taken out of court 7*l.* 14*s.*, the sum which the Defendant had paid in, and which he had previously tendered to the Plaintiff, on a summons, on that day, and that the prothonotary, who had allowed costs up to the time of taking the money out of court, might review his taxation. *Lens* Serjt. shewed cause against this rule, upon an affidavit of the Plaintiff that on the 20th *August* 1811 he applied to *Morton*, his attorney, to bring an action against the Defendant for the amount of the Plaintiff's wages and monies paid for the Defendant's use, amounting together to 14*l.* 14*s.* In the cases of *Zeevin v. Cowell*, *ante*, 2. 203., and *Roberts v. Lambert*, *ibid.* 284., it was indeed held that if the parties have agreed to take a lesser sum than they sued for, or if, upon going on to trial they recover no more, they shall have no costs; but

If a Plaintiff, for the sake of costs, delivers a declaration, and afterwards accepts from the Defendant a sum which was offered to him before declaration, he shall have costs only up to the time of the Plaintiff's first offer.

1812. both those cases have been questioned in a late decision of *Burmester v. Hilch*, 13 *East*, 551.

SAWBRIDGE

v.

COXWELL.

*Onflow* admitted that if the Plaintiff, in afterwards accepting the smaller sum, had receded from his rights, this rule must be discharged; but this was a case of vexation; for the Plaintiff kept out of the way to avoid a tender till after the declaration served, and the Plaintiff's wife, who took the management of all pecuniary matters for him, refused to accept the sum when offered her, the only object of which could be to obtain the costs of the declaration; for it is positively sworn that no more than 7*l.* 14*s.* was ever due.

MANSFIELD C. J. The Plaintiff assigns no reason why he ever asked for more than 7*l.* 14*s.*; if his affidavit had shewn that he demanded more because he had reason to require more, but that he had at length accepted a less sum rather than pursue the cause, it might be different; but the Defendant has positively sworn that no more than 7*l.* 14*s.* was due, and the Plaintiff has not contradicted him. It is not, however, to be taken as a general rule, that because a man does, *pacis causâ*, or from having no hope of getting paid if he recovers more, ultimately accept a smaller sum than he at one time claimed, he is therefore to pay the costs.

HEATH J. The Plaintiff has sworn in such a manner as to mislead the Court, swearing that he instructed his attorney to bring an action for 14*l.* 14*s.*, but not swearing he believes it to be due.

Rule absolute.

1812.

MANLEY, Plaintiff; TATTERSALL and Wife,  
Deforciant.

Feb. 12.

*LENS* Serjt. moved to amend a fine by inserting the word advowson after the word rectory. It was at first apprehended that the word rectory would suffice; but a doubt having arisen as to that point, it was wished to insert the word advowson. The deed declaring the uses of the fine contains the words advowson, do-  
native, &c.

Fine amended by inserting the word advowson, the word rectory being thought insufficient.

*Per Curiam,*

Be it so.

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In the Exchequer-Chamber, 1st Feb., and at Serjeant's Inn, 14th Feb.

REX v. BENJAMIN WALSH, Esq. M. P.

A stockbroker having advised a proprietor of stock as to the proper time of disposing of it, sold the stock for him, and received the proceeds. The principal instructed him to purchase exchequer bills to the amount, but it being too late an hour on that day, the broker lodged the money with his own bankers, and gave the bankers of his principal a check for the amount. On the following day the principal drew a check on his bankers for a larger sum, and gave it to the broker to purchase exchequer bills. The broker received of them bank bills for the check; with a part he bought exchequer bills for his principal, and delivered them to the bankers of the principal, and with part of the residue

he paid for *American* stock and foreign coin, which he had previously purchased with intention to abscond, and paid away the rest in discharge of other debts of his own, and absconded. Held that this was no felony.

THE prisoner was tried at the *Old Bailey* Sessions, held *January* 1812, before *Macdonald* C. B. The first count of the indictment charged him with stealing twenty-two *Bank of England* notes, for the payment of 1000*l.* each, and of the value of 1000*l.* each, and one other for the payment of 200*l.*, the property of *Sir Thomas Plumer*. There were other counts, some describing the property to be a bill of exchange for the payment of 22,200*l.*, and of the value of 22,200*l.*, and others describing it to be a warrant for the payment of the like sum and of the like value, the same being the property of the said *Sir T. Plumer*, and the said sum of money, for the payment whereof they were made, being due thereon to the said *Sir T. Plumer*, the proprietor thereof, against the form of the statute, &c. The jury found the prisoner guilty, and that he received the draft of *Sir T. Plumer* with a fraudulent design of appropriating a part of its proceeds to his own use. A question was reserved for the consideration of the Judges, whether, under this finding, and the circumstances of the case, the offence amounted to felony. The circumstances were, that the prisoner was a stock-broker, and had for some years been employed in that capacity by the prosecutor. In the month of *July* 1811 the prosecutor communicated to the prisoner that he had purchased an estate, and should have occasion to sell stock to pay for it by the 28th of *September*, when the purchase was to be completed; and he consulted the prisoner,

whom

whom he was in the habit of consulting respecting the most advantageous way of investing his property, whether he should then sell out, or wait until the period when the money was to be paid. The stocks were at that time very low, and the prisoner advised him to postpone the sale, which he accordingly did, requesting the prisoner to apprise him of such changes as might occur in the state of the market. In *October*, the title not being yet completed, he again consulted the prisoner on the same point, who repeated the same advice, although the stocks had materially risen in the mean time; assigning as a reason, that the commissioners for liquidating the national debt would in *November* increase their purchases, which circumstance was likely then to have a favourable effect on the funds. About the 25th of *November* the prisoner learning that many persons had bought largely into the funds, on the same speculation on which he had himself relied, anticipated a fall, and wrote to the prosecutor advising him of this opinion, and of the fact that the stocks would shut on the 3d of *December*, in order that the sale might be previously made. He shortly after called on the prosecutor, and stated the same thing. The prosecutor requested him to obtain further information, and on the 29th of *November* requested the prisoner, if he continued in the same way of thinking, to make any bargain with respect to the stock, which he thought proper. In consequence of which, the price of the stock having already begun to fall, the prisoner on that day contracted for the sale of the stock, and represented to the prosecutor that it was to be completed on the 2d of *December*, but no precise day was in truth fixed by the purchaser. The prosecutor not finding it convenient sooner to attend at the bank, completed the transfer on the 5th; but not having instant occasion for the money, he asked the prisoner whether he had not better invest it in exchequer bills, which the prisoner recommended

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mended him to do. The prisoner on that day received the whole proceeds of the stock : upon his alleging that it was too late an hour for the purchase of exchequer bills on that day, he was directed by the prosecutor to pay it to Messrs. *Goslings*, the prosecutor's bankers, to his account. The prisoner paid it to *Robarts* and Co. his own bankers, and gave Messrs. *Goslings* a check on *Robarts* for the amount, 21,500*l.* On the following day he waited on the prosecutor, who gave him a check on *Goslings* for 22,200*l.*, to be invested in exchequer bills, which were to be brought back to the prosecutor the same day, but did not accompany the delivery with any express stipulation that the money should be paid to *Goslings*. The prisoner, who was in great pecuniary embarrassments, had, as it appeared from some of his letters which were intercepted, and were read in evidence, meditated to emigrate to *America*; and in order to raise the means, intended to have appropriated to his own use a large sum, with which he expected to be intrusted about this time by a person named *Oldham*, for the purpose of purchasing stock, and with this view he had on the 29th of *November* applied to an *American* broker to procure him *American* stock, of such sort as would be most useful to a person going to *America*, to the value of 10,000*l.*; and appointed to pay for it on the 4th or 5th of *December*; he had also on the 2d of *December* applied to a dealer in foreign coin to procure him a considerable sum of *Portugal* gold coin; but *Oldham* on the 3d *December* gave him only 1500*l.* to be invested in stock, instead of the large sum he expected; that sum therefore being insufficient to pay for the *American* stock, the prisoner abandoned his design, and he applied the sum in purchasing stock for *Oldham*, as directed. He received of *Goslings*, on the 5th of *December*, payment of the check given him by the prosecutor, and on the same day, with part of that money, he purchased 6500*l.* exchequer bills, and with the residue he paid  
for

for the *American* stock, and discharged several other debts of his own. He lodged the exchequer bills at *Gosling's* for the prosecutor's account, carried him *Gosling's* receipt for them, and told him that he had purchased of Messrs. *Coutts* exchequer bills for the residue of the amount, but that *Trotter*, a partner in *Coutts's* bank, who was then absent from *London*, had them under his own key, and would not return to deliver them till the following *Saturday*. He represented that he had repaid into *Gosling's* hands, to remain there for the mean time, the residue of the prosecutor's money. He had on the morning of the 5th brought with him from the country where he usually slept, a portmanteau of linen and other necessaries with which he had provided himself without the knowledge of his family; and on the same day he purchased some stockings in *London*, saying he was going out of town; and having after these transactions taken possession of the foreign gold coin and *American* securities, he set out for *Falmouth* in the mail, in which he had previously secured a place under a fictitious name, intending to embark for *Lisbon* in a packet, which according to the regular course would sail the day after his arrival, and thence to pass over to *America*. He left with his clerk a note addressed to the prosecutor, purporting to bear date on *Saturday* the 7th of *December*, and stating that the business could not be finished till the following *Monday*; by the delivery of which note upon the *Saturday*, he hoped to gain more time. The bank notes, for stealing which this indictment was preferred, were intended to be the notes paid to the prisoner by Messrs. *Goslings* in discharge of the prosecutor's check on them payable to the prisoner for 22,200*l.*, and the bill of exchange, and the warrant also charged in the indictment, were intended to be descriptive of that check.

The case was argued in the Exchequer-chamber before eleven Judges, *Lawrence J.* being absent, by



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*Scarlett* for the prisoner. He addressed himself in the first place to the counts on the bill of exchange and the warrant for the payment of money, which he contended could not be supported. The statute 2 G. 2. c. 25. s. 3. enacts, "that if any person or persons shall steal any bills of exchange, or warrants for the payment of any money, &c. being the property of any other person, they shall be deemed guilty of felony of the same nature and in the same degree, and with or without benefit of clergy, in the same manner as it would have been if the offender had stolen any other goods of like value with the money due on such bills or warrants, or secured thereby, and remaining unsatisfied." This statute has been considered as extending only to such securities of the kinds therein mentioned as are available while in the hands of the person from whom they were stolen, for if not then available, they can neither be said to be the property of any other person, nor can any money be said to be due on such securities as the statute requires. But a draft drawn by a person upon his own banker, cannot be deemed an available security, as long as it remains in that person's hands; the draft does not constitute any debt between the drawer and the banker, whose liability to the drawer remains precisely the same as before, not altered in any respect by the draft of the check. This instrument therefore being of no value in the hands of the prosecutor, cannot be described, as in this indictment, either as a bill of exchange or warrant for the payment of money, the property of the prosecutor, and upon which the sum of money for the payment whereof it was made, was due thereon to him; and if it cannot, neither can it be brought within the meaning of the act, as has been decided in *Phipps's case*, 2 East. P. C. 599. But admitting that it was a security within the intent of the act, and may be described as in the above counts, there has been no larceny committed in respect of the banker's check.

check. It was given to the prisoner with a view of purchasing exchequer bills to the amount; and so far from its having been stolen by him, it was, as to a part, applied in all respects to the purposes for which it was delivered, for it was carried to the banker upon whom drawn, the money was received on account of it, and the check itself left there, and a part of the proceeds afterwards applied to the purchase of exchequer bills, which were also left with the same banker. Unless therefore it can be shewn that the prisoner in misapplying a part of the proceeds of this draft, whilst the remainder was applied to its proposed object, may be deemed guilty of stealing the whole draft, the charge of felony has not been proved against him in this respect. The remaining question then, which indeed is the principal one, will turn upon the first count. There are three points to be considered: 1st, whether there was a fraudulent taking of these bank notes: 2dly, whether the notes were the property of the prosecutor; and lastly, whether it was done without the consent of the prosecutor. Upon all these points the cases are extremely nice, subtle, and difficult to construe according to the definitions of larceny given in the books. To examine the latter point first, the text writers upon the subject of larceny, though they vary somewhat in their definition of the crime, yet all agree in this, that there must be *fraudulenta contractatio rei alienæ animo furandi invito domino*. Co. Pl. Cor., 3 Inst. 107. 1 Hale, 504. Braff. lib. 3. c. 32. Glanv. lib. 7. c. 17. and lib. 10. c. 15. Mirrour, cap. 1. f. 10. The difficulty which occurs in some of the cases is to distinguish the ground upon which the taking was held to be *invito domino*. The carrier's case, 1 Hale, 504. is familiar, though it is not easy to understand the distinction there made, viz. that the taking out a part of the goods from the package should be deemed a determination of that possession of the carrier which commenced with the owner's

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consent, and yet that the conversion of the whole package by him would not amount to such determination. The same observation is applicable to the decision in the millers' case also, 1 *Roll. Abr.* 73. *pl.* 16. who stole part of the meal delivered him to grind. But without entering into the reasonableness of such a distinction, it is enough to say that in this case the prosecutor parted both with the possession and the property, (supposing the notes could be said at any time to have been his property,) to the prisoner. But in those cases the owner had transferred the possession only, for an especial purpose, and with a limited object, and always looked to the goods being returned. The property therefore still remaining in the owner unaltered by the change of possession, there was reason in construing the conversion of any part of it to be against his consent: but the same reason does not hold where the owner has transferred both the possession and the *jus proprietatis* also, not reserving to himself any expectancy of a return in specie of any portion. The statute 21 *H. 8. c.* 7., which recites doubts whether it were felony at common law, where servants abscond with caskets, and other jewels, money, goods, and chattels delivered unto them by their masters, seems to aim at such a special delivery to the servant, as would transfer a possession to him, and not merely a charge, as in the ordinary cases of sheep committed to a shepherd, or plate to a butler; for those were never doubted. The 3 & 4 *W. & M. c.* 9. *f.* 5. recites that it was a practice to hire lodgings with intent to have an opportunity to take away, embezzle, or purloin the furniture, and then enacts, that it shall be larceny to take away with intent to steal, any furniture which by contract or agreement shall be let to use in such lodging. Both these statutes, whether they be considered as declaratory or enactive, shew at least, that where a party has received under a contract a special use in a property delivered into his

own possession, there was a doubt whether he could be guilty of larceny by any conversion of that property to his own use; but whether or not felony could be committed where the owner gave to the bailee a special right of possession, retaining the *ultimum jus proprietatis*, yet when the owner has spontaneously parted with the *ultimum jus proprietatis*, it is clear that the thing so parted with cannot be the subject of a larceny by the person receiving it. *Rex v. Nicholson Jones and Chappel*, 2 East. P. C. 669. *Park's case*, *ibid.* 671. *Catherine Coleman's case*, *ibid.* 672. *Atkinson's case*, *ibid.* 673. The last was held to come within the statute 33 H. 8. c. 1., which makes it an offence punishable by imprisonment and pillory, falsely and deceitfully to obtain or get into the hands or possession of the offender, any money, goods, or other things of any person or persons, by colour and means of any false token or counterfeit letter made in any other man's name. The distinction therefore is, that although where the prisoner, with the consent of the owner, receives the possession, his subsequent act may, under circumstances, be felony, yet where he acquires the right of property with consent of the owner, no subsequent application of it by the prisoner can constitute a felony, though it may, if other circumstances concur, be an offence within the last-mentioned statute, or within the statute of false pretences, 30 G. 2. c. 24. s. 1., which, like the former, speaks of an intent to cheat and defraud. This is the mere case, where a man contracts to do a thing which is in the course of his trade, for a certain commission: the money paid to him on this contract creates a debt, and nothing but a debt. Supposing that the notes had been, (which they never were,) the property of the prosecutor, the contract was not that the prosecutor should receive back these identical notes, but something in lieu of them. If these notes ever were the property of the

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prosecutor, he might bring trover for them, and a tender of other notes or of guineas would be no answer to the action: if they were not his property, he could not bring trover, though he might bring an action for money had and received, or for money lent, and a tender of other notes would be an answer to that action. There is no one case of adjudged felony, in which if the *animus furandi* were absent, trover would not lie, and a conversion be proved, and if there were no conversion, then there would be no felony. But in the next place, the property in these identical notes, never was vested in the prosecutor. If a person should send a servant with authority to receive notes and to bring them to him, it would be different: but it was proved to be no part of this contract, that the prisoner should receive the property at the banker's desk. If he had paid the check to *Robarts*, his own banker, it could not be said that when *Robarts* received the notes of *Gossings*, they became the prosecutor's property; nor when the prisoner received the notes of his own banker. There is no period then, when the property of the notes could vest in the prosecutor. 1 *Hale*, 505., after mentioning the statute 21 H. 8. c. 7., cites a case from *Dalton*, c. 102. *A.* the servant of *B.* receives the rents of *B.*, and *animus furandi* carries them away, this is not felony at common law, because *A.* had it by delivery; nor by the statute, because he had it not from his master or mistress. [*Heath J.* It was determined to be no felony in a similar case, *Rex v. Bazely*, 2 *East*. P. C. 571., where bank-notes were paid into a banker's, by delivery to a clerk in the bank, and he put the notes in his pocket; for they never were in the possession of the banker, his master.] This case would support the proposition, even if the prisoner had been a mere servant of the prosecutor, but in fact he was no servant. Unless therefore this came within the recent statute, as a receipt by the

prisoner from another person, of notes on account of his master, it is no felony. It is true that the jury found fraud; but fraud alone will not constitute felony, even the case of a false message or token, which obtained the property, is no felony. There is no case of constructive felony, in which there is not some act of circumvention, fraud, or treachery, not merely in the subsequent appropriation, but in the means by which the possession is obtained; so that there is a trespass, and not a mere design to fraudulently take. As in the case of the recovery of land by a judgment in ejectment, and taking and selling the property on the land, *Farr's case*, *Kel.* 44. So, in taking a horse by replevin from the sheriff. *Le Mott's case*, *Kel.* 42. Here is no act of the prisoner, which is conducive to getting the possession. The first advice, not to sell, was good, and another person of judgment, whom the prosecutor consulted, concurred in it. He does not recommend himself as agent to the prosecutor, nor allege any thing false, like *Aickles*, 1 *Leach*, 330., who introduced himself to discount a bill, and obtained the bill by an express fraudulent allegation. The advice to invest the money in exchequer-bills was good. If the mere circumstance of misapplying a sum received under an implied contract to apply it in the course of trade, be sufficient to constitute a felony, any banker, factor, or other merchant, who should find his circumstances declining, and should determine that thereafter he would spend all the money he should receive, would be a felon. [Lord *Ellenborough C.J.* observed on the circumstance which appeared, that the prisoner came to *Lincoln's-Inn* for the purpose of repeating his advice, and that he wrote notes to the prosecutor to that effect.] That advice, however, was good, there was no delusion practised, or at least no otherwise than in impressing on the prosecutor's mind the idea that the prisoner would deal honestly with the proceeds. It

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would have been different if he had knowingly given any false representation of the state of the market, or the circumstances of the funds, when he knew they would be otherwise. [*Mansfield C. J.* observed that the question whether these notes were the property of the prosecutor, would beget nice questions under certain circumstances, as if the prisoner had dropped down dead with the notes in his pocket, a court of equity would have restrained his executor from parting with them; or if, after the prisoner had got the notes, the prosecutor had countermanded the authority, whether a court of equity would not have compelled the prisoner to give up the notes. It is laying down the proposition too widely, to say that the notes could be in no case the property of the prosecutor.] The old cases say money has no ear mark, and bank-notes are to that purpose money.

*Gurney* was heard for the prosecution, partly on the same day, but principally on a day subsequent to the term, at *Serjeant's-Inn-Hall*, before ten Judges, *Lawrence* and *Chambre Js.* being absent. He recapitulated all the circumstances which shewed a fraudulent and premeditated design in the prisoner, and contended that they constituted in law a larceny, which is, according to *Bracton*, lib. 3. fol. 150., a fraudulent taking of the property of another, with an intention of stealing, against the will of the owner. There was in this case a fraudulent taking with intent to steal, against the will of the owner, *lucri causâ*. The taking was fraudulent; if the prisoner had declared his real purpose, he never would have obtained it. It was *invito domino*, because if he had declared his real purpose, he never would have been permitted to take the notes. It is said that there was no larceny, because the draft on the banker was of no value in the drawer's hands. *Phipps's case* does not bear out this proposition; for there the note

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was ready written on paper, and with pen and ink the property of the prisoner, and the drawer executed it with the knife at his throat. This case is the same as if the prosecutor had gone with the prisoner to *Gosling's* bank, and told them to give the prisoner 22,000*l.*, in which case the notes clearly would be the prosecutor's property. It makes no difference that stock-broking was in the course of the prisoner's business. The case of *Nicholson, Jones, and Chappel* is not applicable: *Cartwright*, the prosecutor, did engage in the gaming: in the first instance he won, and intended to part with the property, and from all controul over it in every shape. *Coleman's* case is a case of money obtained on a false pretence, the name of a third person being introduced. And *Atkinson's* case is the same; the prisoner sent *Dale* with a letter, with directions to tell *Dunn* that he was sent by *Broad* to borrow 3*l.*; that was completely a case of false pretences. This class of cases is materially distinguishable from the present case. The prosecutor had not, as is supposed, parted with *ultimum jus proprietatis*. If the prosecutor had found the prisoner dying in the street with this money in his pocket, he might lawfully have taken it out, if he had seen the prisoner paying the notes to *De Berdt* for the *American* stock, he might have assumed them. When the banker had parted with the notes to the prisoner, they were no longer the banker's notes, and they were not the prisoner's, because they were delivered to him for a special purpose. 2 *East. P.C.* 673. *Gould J.* lays down the rule as clearly settled, that the possession of personal chattels follows the right of property in them; the possession of the servant was the possession of the master, which could not be divested by a tortious taking from the servant, and that this rule held in all cases where servants had not the absolute dominion over property, but were entrusted with it for a particular purpose.

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purpose. This, therefore, was the possession of the prosecutor. The first receipt by the clerk or servant in the cases which have been held not to be felony, is lawful; and in *Charlwood's case*, 2 *East. P. C.* 689. the distinction is taken, whether the possession comes to him without the prisoner's having pre-conceived any felonious intention; and in all the cases of embezzlement by banker's servants, it is to be observed, the possession was obtained without any previous intent of conversion to the prisoner's own use. In the *Silk throwster's case*, *Kelyng*, 35. it was held felony to steal silk, in one who came to work in the prosecutor's own house, and to whom the silk was there delivered. There are other cases where a possession, not of the owner, has been taken to be his possession. 1 *Hawk. P. C. c.* 33. *f.* 13. Even the possession of a thief is in law the possession of the owner. *Meeres's case*. 1 *Sbo.* 51. That was a case before the statute of 3 and 4 *W. & M. c.* 9. *f.* 5. of robbing ready-furnished lodgings, and it was held to be no felony, because the first possession of the prisoner was lawful, and there was no intention to steal when the man took the lodgings, and the original possession being lawful and with consent of the party, there could be no taking afterwards; but if it had appeared clearly that the intention of the party was not to have the benefit of the lodgings, but to get possession of the goods, it should be felony. *Hawk. lib.* 1. *c.* 33. *f.* 24. contains a very sensible observation, that it brings a contempt upon the justice of the nation, to suffer its laws to be defeated by such little contrivances. *Kelyng*, 81. it was held that there was no felony where there was no trespass; but the case in 13 *Ed. 4. fol.* 9. *pl.* 5. is a stronger case, where a carrier broke open certain packs, which were delivered to him to carry, and it was resolved to be felony, because his subsequent act was evidence of the prior felonious intent, but *Kelyng* thought that the case

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of the lodgings was much stronger than this of the carrier. *Co. Pl. Cor.* 64. *Kel.* 44., the raising a hue-and-cry in the night, and getting a constable to open a house, and then stealing therein, is burglary; and if one cheapening a horse, and trying him, ride off with him, it is felony. And *Kelyng* C. J. doubted of the case of a carrier selling the whole of a ton of wine, delivered him to carry, which in *13 Ed. 4. 9. b.*, was held to be no felony. It is said that in the principal case there was no felony, because it never was intended that the prosecutor should have possession of the goods again; but a confignor, who never intends to have the goods again, may, if they are stolen from his carrier, in an indictment for larceny, lay them to be the confignor's own property. *Wynne's case*, 2 *East. P. C.* 664., is a still stronger case, for the hackney coachman has not even a charge of the goods brought into his coach by the person hiring it: the goods are legally left in his possession. *Cartwright v. Green*, 8 *Ves.* 405. Possession forms no part whatever of the definition of felony. The Defendants demurred to answer to a bill in Chancery, because they should have accused themselves of felony, where they had taken guineas secreted in a bureau, which was delivered to them to be repaired, the money being there unknown to the owner, and Lord *Eldon* allowed the demurrer. There is a series of cases respecting the acquiring property with the will of the owner, in one sense, because it is with an understanding that the property is to be employed for one purpose, and it is applied to another. *T. Raym.* 275. *Chiffor's case*, cheapening goods and running away with them, was held felony, and in the judgment is cited *Farr's case*; above-cited. In that case, when the woman put the cravats into the prisoner's hands, it depended on him whether he should ever return them again: if he had put down 7s, instead of 3s., he might lawfully have taken

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taken them. All the cases of ring-dropping are in point. In *Patch's* case, 2 *East. P.C.* 678., it was held a felony, and the opinions of the three Judges were founded on this, that the possession was obtained by fraud, and the property was not altered, for it was the intention of the prosecutor to have it again. *Gurney* admitted that if the prosecutor had parted with the entire property, it was not a stealing by the prisoner. 2 *East. P.C.* 679. *Humphrey Moore* was indicted for stealing 20 guineas and 4 doubloons, of *John Field*. The jury were of opinion the parties were all confederated for the purpose of obtaining the money; nine Judges, Lord *Mansfield* C.J. being absent, thought the money and doubloons were delivered as a pledge, not as a loan: Lord *Loughborough* C.J. and *Skynner* C.B. thought the doubloons were money, and the money lent, and that the prosecutor had parted with the property. So, *John Watson's* case, 2 *East. P.C.*, 680. *S.C.* 2 *Leach*, 730. Other cases are, *Paradice's* case, 2 *East. P.C.* 565. where a clerk was directed by his master to send away a bill by the post, but stole it and absconded; in *Easter* term 1766, all the Judges, except Lord *Camden*, who was absent, held it larceny, on the ground that the possession still remained with the master. That is a stronger case than this, for it was not there found that the prisoner obtained the possession with intent to steal. Case of *Wm. Watson*, 2 *East. P.C.* 562. [*Heath* J. That case has been overruled.] The Judges there held that there was no felony, because the great feature of a fraudulent obtaining with intent to steal was wanting. But in *Lavender's* case, 2 *East. P.C.* 566., where a servant absconding with money given him by his master, to be carried to another person, was held guilty of felony, *Wm. Watson's* case, was held not to be law, for that he was commissioned to merchandize with the money. *Chibchafes's* case, 2 *Leach* 805., is next: the prisoner, who was cashier

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cashier to the prosecutors, in the course of his ordinary business carried bills to their bankers, and received money for them, and absconded with it; and it was urged that it was only a breach of trust; but *Heath J.* held it a clear felony. *Case of Sharplefs and Greatoren, 2 East. P.C., 75.* Persons took lodgings, and ordered goods thither, the tradesman's servant brought them and left them, and the prisoner carried them off; it was urged to be no felony, for the servant of the vendor had willingly parted with the goods; yet the Judges held it felony, for even if there had been no prior intent to steal, there was not a sufficient delivery to change the property. In *Wilkins's case, 2 East. P.C., 673.*, the servant under a delusion, willingly parted with the goods; it was held by *Gould J.* that the possession of the servant was as the possession of the master, and that there was not a sufficient delivery to change the possession. *Noah Pierce's case, 2 East. P.C. 673.*, the prisoner went to a post-office, pretending to be a mail guard, and obtained from the post-master the bags of letters, and the question was, whether he was guilty of a capital offence in stealing out of the post-office, and not of a mere larceny; and all the Judges held him guilty of the capital offence, because of the artifice. In *Pear's case, 2 East. P.C., 685.*, who was indicted for horse stealing, committed in selling a mare he had hired; seven out of eleven Judges thought it a clear felony, two thought it not a felony, two doubted whether the statute of false tokens had not made a difference: as to the question whether the mode of obtaining the mare, on pretence of going to *Sutton*, would amount to a trespass in that case, *Raymond C. J.* cited *Litt. f. 71.* "If I lend to one my sheep to tathe his land, or my oxen to plough the land, and he killeth my cattle, I may have an action of trespass against him notwithstanding the lending;" ten Judges therefore held the offence to be a felony. *Charlwood's case,*

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case, 2 *East. P.C.* 689. *acc.* *Major Semple's case*, 2 *East. P.C.*, 691. *acc.* Another case very important in considering this question, is that of *Aickles*, 2 *East. P.C.*, 675. He was tried for stealing a bill of exchange; the bill was delivered to him to get discounted, in consequence of his having left his address with the prosecutor. The prosecutor suspecting the prisoner, desired his servant not to lose sight of him, but the prisoner eluded him, and went off with the bill. Two points were made, first, whether the prisoner had a preconcerted design to get the notes into his possession with an intent to steal it; and next, whether the prosecutor intended to part with the note to the prisoner, without having the money paid first. The jury found the affirmative of the first, and the negative of the second question, and concluded that the prisoner was guilty; and all the Judges held the conviction proper. The prosecutor in that case, indeed, must have retained the property of the bill, for if the prisoner had taken it with an honest intent to discount it, and had not succeeded, he must have returned it to the prosecutor. “*Rex v. Oliver*, a MS. case before *Wood B. Northumberland Summer assizes 1811*. The prisoner was indicted for stealing 35*l.*, under the following circumstances. The prisoner having obtained a quantity of gold, went to a public house in the neighbourhood of *Newcastle-upon-Tyne*; *William Smith* the prosecutor, who was groom to Sir *James Hall*, and who had about him notes belonging to his master, to a considerable amount, happened to enter the room where the prisoner was; soon afterwards the prisoner took an occasion to make a display of his gold, when a conversation respecting it ensued between the prisoner and the prosecutor; the prosecutor expressed a wish that the prisoner would oblige him by some gold in exchange for notes and silver; the gold was not to be purchased at an advanced price, but was to be taken

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at its legal currency. The prisoner stated that if it would be any material accommodation to the prosecutor, and the prosecutor would do him the same kindness on a future occasion, he would let him have some gold, in exchange for notes and silver; this was done to a small amount. The prisoner then observed that if it would be of any material service to the prosecutor, he would procure him a considerable further quantity of gold, if the prosecutor would lay down notes to the amount: upon this the prosecutor paid to the prisoner 35*l.* in bank-notes, which the prisoner took up, and went out, promising to return immediately with the gold. The prisoner did not return, and the prosecutor never saw him again till he was apprehended. Upon these facts being proved, *Wood B.* held, that the case clearly did amount to larceny, if the jury believed the intention of the prisoner was to run away with the notes, and never to return with the gold; whether the prisoner had at the time the *animus furandi*, was the sole point upon which the question turned. As to what had been said with regard to the parting with the property, it had in truth never been parted with at all. That could only be done by contract, which required the assent of two minds, that here was not the assent of the mind either of the prosecutor or of the prisoner; the prosecutor only meant to part with his notes in the faith of having the gold in return, and the prisoner never meant to barter, but to steal." *Case of R. Monday, 2 East. P. C. 594.* The prisoner obtained possession of a house under an agreement for a lease of twenty-one years, and stripped it of all the lead. The jury found that he took the house with intent to steal, and found him guilty of the charge; and he was imprisoned two years. *Campbell's case, 2 Leach, 642.* The prisoner absconded with a bank-note, sent to him with a request that he would give change for it; this was held to be larceny, but not in a dwelling-

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dwelling-house, because it was in the possession of the person; yet there the prisoner was not guilty of any fraud in obtaining the possession. The prosecutrix sent the note to him; she never expected to see the note again; it was never to be returned in *specie*. The two cases of *Spears* and of *Abraham*, 2 East. P. C. 568 & 9. are relevant to this point. *Spears* was indicted for stealing 40 bushels of oats: he was sent to get a barge load of oats, in bulk: he ordered 5 quarters to be put in sacks, the rest in bulk, and stole that which was in sacks. [Heath J. That case went upon the ground that the corn was in the prosecutor's barges, which was the same thing as if it had been in his granary.] The other was a prosecution for stealing five quarters of oats: the prisoner and another came in a boat alongside a Dutch vessel laden with oats, which the prisoner's master had purchased, and which were then discharging, and handed in 10 sacks to be filled and tied, saying they were to go by a country lug boat, and having obtained them, he sold them for his own use; and it was held a felony. It was said, that it was no part of the contract with the prisoner that he should take this check to *Gosling's*, and that he might have taken it to his own banker; but the prosecutor swore he expected the prisoner would go to *Gosling's*, and he did in fact go there with it, and it was the natural course of things that he should do so. It was said, that the prosecutor meant to credit the prisoner with this sum, and it constituted him a debtor. To a debt, it is necessary that there should be a contract; to a contract, the consent of two minds, both willing the same thing, is requisite. It is idle to say that the prosecutor meant to give credit for 22,000*l.* to one who was known not to be worth as many hundreds, having recently been a bankrupt, and whose former conduct was known. The prisoner was the agent of the prosecutor. The notes became the prosecutor's property at the moment when they

they were handed over the counter in exchange for the check: if some one had at that moment come in with news which occasioned the house to stop their payments, the prisoner would have had a right to claim those notes as the property of the prosecutor; and to refuse to restore them to the bankers who had the check. It is said there must be something of fraud and circumvention to convert a voluntary delivery to a larceny, as in *Semple's* and *Pear's* cases. There cannot be in any case more of circumvention practised than here; the prisoner was not to go and merchandize with the money in any way which he thought best for his employer; if he had employed it even for an honest purpose, being a different purpose from that for which he received it, he would have been guilty of a conversion. It is asked where the trespass is in this case. The only difficulty is, of proving that the prisoner took the notes with an intent to convert them to his own use; but when that is proved by the subsequent conversion, the trespass is clear. As to the counts laid on the draft, as to which it is argued that it could not be larceny to take it, because the intent of the statute 2 G. 2. c. 25. was to make stealing a draft a felony only where it was in the custody of others than the drawer, the answer is, that in many cases the purview of a statute has reached beyond the apparent intent of the statute. Thus the statutes of forging wills, 2 G. 2. c. 25. and 31 G. 2. c. 10. s. 34. were meant to protect heirs at law against forged wills; yet the forging the will of a person living, with intent to defraud, is held to be within those acts. Here the jury have found that the prisoner took the money with intent to steal it, which suffices. This is no extension of the law of larceny, as it is recognized by the *Fleta*, *Bracton*, the *Mirraur*, and Lord *Coke*. The *Fleta* and *Bracton* have the word fraudulently, the *Mirraur* the word treacherously. Lord *Coke* uses the word fraudulent. Here it is found that the taking was

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fraudulent, and all the authorities shew that property is taken *invito domino*, where it is taken with an intent of the owner that it should be applied to a different purpose from that to which the taker applies it, as is the case here. *East*. 2 P. C. 682. puts the law well. First, that where notwithstanding a delivery by the owner in fact, the legal possession remains exclusively in him, larceny may be committed, exactly the same as if no such delivery had been made. Secondly, that where, by the delivery, a special property, and consequently a legal possession, apart from any felonious intent, would be transferred, there, if it be found that such delivery were fraudulently procured with a felonious intent to convert the property so acquired; then also the taking amounts to larceny. So in 2 P. C. 554. *East* cites from the MSS. of *Chapple J.*, " though the possession be delivered by the owner for a particular purpose, yet if it be obtained by any fraud, it amounts to a tortious taking, in the same degree as if the party had taken it without any delivery from the owner; though otherwise, if the delivery be obtained on a trust without fraud."

*Scarlett*, in reply, supported the points he had made, 1st, That no fraud had been practised by the prisoner in obtaining the property. 2dly, That the property of the bank notes never was in the prosecutor. 3dly, That if it ever was in him, he had parted with the property both of the notes and of the draft, on a trust; and never intended either of them should be returned. All the circumstances of fraud on which so much stress has been laid are mere indications of the *animus furandi*: such are the contract for the *American* stock, the prisoner's taking his place in the mail, his buying stockings, and providing linen and foreign coin. But these were no part of any fraud practised on the prosecutor to induce him to part with the possession. They were unknown to him. And

it is observable, that when the stock was sold, all the proceeds went into the hands of the prosecutor. Here then is a pause in this transaction. The property is then in the hands of the prosecutor. There was hitherto no felony. The felony, if any, was in getting it back again. But the prosecutor stated, that he knew not but that the proposition for purchasing exchequer bills might very probably have first come from himself, and on that day the prosecutor entrusts the prisoner with the money, to leave at the prosecutor's bankers, and desires him to call and receive a check for it the next day. It does not appear that he ever asked the prosecutor whether he should lay it out in exchequer bills. It does not appear that on the 5th of *December*, when the prisoner came to the prosecutor's chambers, he urged him to buy exchequer bills, or practised any *fraudulenta contructio*, and the jury have not here found a covinous obtaining. Next; the notes never were the prosecutor's; it is supposed that they became his at the moment when they were put into the hands of the prisoner. This wholly militates with *Bazeley's* case. He, being a banker's clerk, had a sum paid him for his master; one of the bills, instead of putting it into the till, he put into his own pocket. There the jury in effect, though not in terms, found a fraudulent intent, in finding him guilty. But there the Court held that the property of the bill never vested in the master: so here the property of these notes never vested in the prosecutor, although this check, which was payable to the prisoner or bearer, was given for a particular purpose, the moment it was put into the prisoner's hands, it became a matter of indifference, so long as the proceeds should be applied to that purpose, who had the check; it was no part of the contract that the prisoner should go to receive the notes or turn the check into money. No authority is cited to shew that an action of trespass lies on this finding. It might be, as it was said, important to consider whether if the prisoner

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had dropped down dead with this money about him, a court of equity would preserve this property for the prosecutor. Supposing that any body of creditors were now lying in wait to become accessaries after the fact, and to divide this property, doubtless a court of equity would interfere. But that very interference would establish this point for the prisoner. A court of equity might interfere on either one of these two grounds, 1st, to enforce a specific performance of the contract to purchase these exchequer bills; 2dly, that it is a case of trust; and that the assignees might be told, that they shall not take the property without executing the trust; but both of these grounds rest on the very foundation that the legal property is in the trustee, and all that this Court has to do with, is to be satisfied that there is no case where a fraud between a *cuius que trust* and a trustee has been held to amount to a felony. The reason why the forgery of the will of a living person is felony, is because it is within the words of the statute; but this case is not within the words of the stat. 2 G. 2. c. 25. s. 3. Suppose a stranger wrongfully destroys a check prepared for use, the drawer loses nothing: he has the same credit on his banker as before. Larceny must be complete by the taking, and what is afterwards done with the thing stolen signifies not. Not so if the stranger takes a bill of exchange and destroys it; for though acts of parliament give modes of replacing it, if destroyed, yet the tort destroys a valuable property, it takes from the owner that which would enforce a payment from another, which a check will not do. But further, there is no misapplication of the check, therefore no theft of it. The theft, if any, is of the notes received for the check. And it is inconsistent to say the prisoner stole the check, when he applied it, as it was his duty to apply it, viz. to receive the money on it: therefore there was no stealing of the check.

As to the cases cited, it might be difficult to reconcile all of them to the original definition of felony, which certainly was, of a taking without the knowledge of the owner; but means being invented to take them with the knowledge and will of the owner, the Courts held that to be within the definition. One class of cases is, where an owner delivers up the manual possession of goods, but retains the legal possession, because he retains the property: Such are the *Silk-throwster's* case, *Aickle's* and *Campbell's* cases, though the last may seem in some measure to clash with *Coleman's* case. In *Campbell's* case there was no consent that the prisoner should have the note first, and give the change afterwards; he obtained it from the servant, whose possession was the mistresses' possession, without the mistresses' consent, for the servant was not directed to part with it, but on receiving the change. So, in *Oliver's* case the contract was incomplete, the prosecutor putting down the money, *Oliver* takes it up, even without consent, which was clearly a trespass. Another class of cases is that, where the owner parts with the legal possession by delivery, but retains the property and the possession in himself, yet gives a possession to the other as against strangers, as where a man gives a chattel to a friend to keep, which is a mere charge or bailment. Some cases say that in such case there can be no felony, (by the trustee) because it is a trust. *Glanvil*, lib. 10. c. 13., on loans, mentioning the case of a man who lends to a friend for a specific purpose, who keeps the thing beyond the time, or applies it to another purpose, says *a furto omnimodo excusatur*. The modern cases go not quite that length, but they approach to the principle, and therefore are the rather to be adhered to. Such is the carrier's case, *Kel.* 81. It may, perhaps, be reconciled upon the principle that the possession of a personal chattel follows the property, and that where he

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violates that trust, it may be considered as a new taking, 6 *Carpenter's case*, 6 Co. 290., it is held that if legal possession be given by the party, no subsequent abuse will make the act a trespass *ab initio*; but only from the time of exceeding. So if the carrier breaks the parcel, he commits felony, because the breaking actually makes a new taking, and commences a new possession; but if he merely detains the goods, it may be a continuation of the same possession. This appears more plausible than the reason assigned in *Kelyng*, that it is evidence of an original felonious intent; for he might with a truly innocent intention, detain the goods a year, and yet commence a felony at the end of it. The third class of cases is that, where the owner gives a possession not only as against strangers, but an usufructuary possession against himself, he still retaining the property. Such are the cases of hired lodgings. *Raven's case*, *Kel.* 21. and 81., it was held no felony; yet *Kelyng C.J.* doubted afterwards, but he does not at last say it is felony, but that it is deserving of consideration; and this case is less strong than the carrier's case. *Meeres's case*, *Sho.* 50, (stealing from a hired lodging,) was argued by *Shower* and *Northey*, and the Judges thought it a case of doubt, but held that it was no felony. *Pollexfen C.J.* held it was a felony, because the sheriff might take the goods under a writ of *feri facias* against the landlord: but that reason is not law; [*Bayley J. acc.*] and the pregnant inference is, that if the sheriff could not take them, it could be no felony. In the silk throwster's case the taking was in the master's house; but if the owner of cloth delivers it out to a tailor, to make up, and he steals it, that is no felony. Numerous acts have passed to inflict a particular punishment on the misdemeanor, (it not being a felony,) where a weaver or other manufacturer embezzles wool, cotton, or other materials dealt out to him to be carried to his home,

and

and to be there worked up ; but none of those cases was ever held to be a felony. In the case of *Cartwright v. Green*, Lord *Eldon* went on the very ground that the guineas were never meant to be delivered with the drawers, nor to be parted with. The last class of cases is that, where the property as well as the possession has been parted with by the proprietor, and no one case has ever been reported, where the misapplication of things so circumstanced has been held felony. Such are *Nicholson's* case, *Catherine Coleman's* case, and others, cited before, and in every one of those cases the jury found there was a receiving with a fraudulent design, yet it was held no felony. This case is exactly analogous. Ingeniously is put the case of consignor and consignee, where goods are given to a carrier, yet if they are stolen in the custody of the carrier, they may in an indictment be laid to be the goods of the consignor, but the terms of the case are against the argument : for if the goods are delivered to the carrier, at the risk of the consignee, the consignor looks only for an equivalent, not to have the goods back ; and then they cannot be laid to be the consignor's goods ; if indeed they are sent at the risk of the consignor, they are still in the possession of the consignor, although in the charge of the carrier. All the cases of ring-dropping are cases where the property has been delivered only as a pledge, and has been run away with *alio intuitu*, and where there has been no delivery therefore of the possession. The cases next to be considered are those of constructive felony. *Pear's* case. *Pear* solicits the horse, and procures it to be delivered to him. That case, and likewise *Scample's* case, 2 *Esq*, *P.C.* 691., differ materially from the principal case in this, that the owners never meant to part with the property. This case differs not from the case where a man buys goods, and never intends to pay for them. In the numerous cases which

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daily occur, where a person at the verge of bankruptcy goes on buying goods; it must be presumed that he never intends to pay for them; for he knows he never can. Yet this will not constitute felony. So, a tradesman in the country remits a bill to a factor here, to procure him goods, who negotiates it for his own benefit, that is no felony. If the prisoner had simply said to the prosecutor, my banker has given me too great credit, and I cannot get him to pay my check till *Wednesday*, would that be felony? Yet in that case it would have been equally a design to receive the money fraudulently, and apply it to his own use. In *Chiffor's* case, a leading case of a numerous class; the second reason given is, that the contract was not perfected. Here the contract was perfected. It was therefore no felony.

*Cur. adv. vult.*

No judgment was ever publicly pronounced in this case, but the prisoner was liberated. In the same year an act was passed, 52 G. 3. c. 63. making it felony in brokers, bankers, and others, to embezzle securities deposited with them for safe custody, or for any special purpose, in violation of good faith, and contrary to the special purpose for which they were deposited.

END OF HILARY TERM.

# C A S E S

ARGUED AND DETERMINED

1812.

IN THE

Courts of COMMON PLEAS,

AND

EXCHEQUER-CHAMBER,

IN

Easter Term,

In the Fifty-second Year of the Reign of GEORGE III.

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COTTERILL v. CUFF and Others.

*April 17.*

THE Plaintiff declared that in consideration that he the Plaintiff, at the request of the Defendants, bargained for and agreed to buy from the Defendants a certain quantity, to wit, 259 bales of bacon, then in the possession of the Defendants, at a certain rate or price, to wit, the rate or price of 72 shillings *per* hundred weight, to be paid to them by the Plaintiff in manner then and there agreed upon between them, (that is to say,) by approved bills at two months, in 14 days from that time, the Defendants promised the Plaintiff that the bacon was prime bacon; and although the Plaintiff

In assumpsit it is sufficient if the declaration shews so much of the terms beneficial to the Plaintiff in a contract, as comprehends the point for the failure of which the Plaintiff sues.

after-



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afterwards did so buy, receive, and pay for the same bacon, yet the Defendants, not regarding their promise, deceived and defrauded him in this, to wit, that a great part, to wit, 159 bales of the bacon was not prime bacon, but on the contrary thereof, was of very bad and inferior quality, and wholly unmerchantable and unprofitable to the Plaintiff. There were other counts stating the mode of payment in different ways, but all founded on an allegation that the Defendants promised that the bacon was of a good quality, and alleged a breach in the badness of the quality. Upon the trial of the cause at the *London* sittings after *Hilary* term 1812, before *Mansfield* C. J., the evidence was, that the bacon in question was sold with other bacon under the following invoice: *London*, 31st *May* 1811. Sold for Messrs. *Cuff*, *Dickinson*, and Co. to Mr. *Edmund Cotterill* sen., 229 bales prime singed bacon, (*Strangeman*), 72s. 200 do. do. do. do., (*Wade*), 70s. per cwt. payable per approved bills, at 2 months, in 14 days from this time. An average for taint and short weight on *Wade*'s, and an average for short weight only on *Strangeman*'s. 125 *Wade*'s, here, 75 do., *Active*, 259 *Strangeman*'s, here. *Richd. Ellis*. The delivery of the goods, payment, and defect of quality being proved, the jury found a verdict for the Plaintiff, which

*Vaughan* Serjt. now moved to set aside, upon the alleged ground of a variance between the declaration and the contract proved; for the contract, he said, was for prime singed bacon, of *Strangeman*'s manufacture, at 72s., and the Plaintiff had only selected the ingredient of its being prime, and had left the residue of the contract unnoticed. He had also separated this part of the contract, which was entire, from that part which related to the contract for 200 bales of *Wade*'s manufacture, at 70s., and from the distinction made, that there was no average

average for taint in *Strangeman's* bacon, but that there was on *Wade's*. It was also an essential ingredient that the bacon was to be singed, not scalded, and that it was to be *Strangeman's* manufacture, not that of any other person. He also complained of excess of damages, upon which point the Court differed from him in opinion.

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MANSFIELD C. J. The only point the Plaintiff disputes with the Defendant is, that the bacon is not prime bacon ; and therefore it is enough for him to aver the contract for bacon possessing that quality. If there were 20 other qualifications annexed to the contract, would it be necessary to state them all ?

CHAMBRE J. The Plaintiff must state all that relates to the point of which he complains ; beyond that he needs not go. There is no complaint of failure in any other particular. He does not complain that the bacon is not of *Strangeman's* manufacture, or that it is not singed ; it is sufficient to state so much of the contract, as shews the particular promise, for the breach whereof he complains. Is it necessary to set out the whole of a deed, if it relates not to the matter in issue ?

The Court refused the rule.

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April 18.

WILSON v. VYSAR.

A bill of exchange written on a wrong stamp, is no payment, although the parties would have paid it if presented at due time.

THIS was an action for goods sold and delivered, tried at the *London* sittings after *Hilary* term before *Mansfield* C. J., when a verdict was found for the Plaintiff, reserving the point which arose under the following circumstances. The defence was payment. A bill drawn by *Hall* on *Bettridge*, and accepted by him, was given for the goods, and indorsed over by the Defendant to the Plaintiff: it was not presented for payment when due; the acceptor became unable to pay it; and in consequence of the laches, payment was refused by the drawer and the Defendant. To rebut this defence the Plaintiff proved that the bill was drawn on a stamp of inferior value, and therefore could not be given in evidence. In answer to this argument, it was sworn, that if it had been presented at the time of maturity, it would have been paid, notwithstanding the defect of stamp, and that a clerk of the acceptor had received express orders from his master to pay it, and had sufficient assets in his hands at that time for the purpose. Therefore this piece of paper, though it could not be called a bill, nor could be produced in evidence as such, would have been value equivalent to the goods, if there had not been laches.

*Shepherd* Serjt. on this ground now moved for a new trial; but the Court held they could in no light consider it as payment, and refused the rule.

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DOE on Demise of MESSITER v. DYNELEY.

April 20.

**B**EST Serjt. applied on behalf of the Defendant, that the writ of execution in this case might be stayed until four days after the Plaintiff should have chosen to tax his costs, upon the ground that the Defendant wished to bring a writ of error, and had obtained the allowance of error; but that the Plaintiff not having chosen to tax his costs, without which the amount of the penalty of the recognizance of the bail in error could not be fixed, it did not operate as a *superfedeas*. It was said in *Betts d. Robson v. Egerton, Barnes*, 212, that the Court would interfere in this manner.

If the Plaintiff, after obtaining a verdict in ejectment, sues out a writ of *habere facias possessionem* without waiting to tax his costs, the Defendant's writ of error will not operate as a *superfedeas*.

*The Court* held, that if the Plaintiff chose to waive the taxation of his costs, and proceed for the possession only, it was competent for him so to do, although in that case the allowance of error was no *superfedeas*; and instanced the case of a person who, having recovered in the King's Bench a verdict for 2000*l.*, and foreseeing that error would be brought for delay, waived his costs and took the Defendant in execution: and the Court held that it was all regular, and that the writ of error was in that case no *superfedeas*.

Rule refused.

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April 21.

BUSK v. WALSH and Another.

The Plaintiff having paid a premium on an illegal bet made with the Defendant on a future event, before the risk was determined, claimed to be allowed to prove as a debt under the commission of bankrupt which had afterwards issued against the Defendant, the amount of the premiums, but was refused by the commissioners. The commission being afterwards superseded, the Plaintiff after the risk determined sued the bankrupt to recover back the premiums without further notice: held that the claim made upon the assignees was sufficient notice to the Defendant of the Plaintiff's intention to rescind the illegal contract.

THIS was an action for money had and received, brought to recover back the sum of 378*l.*, being the amount of the premiums which the Plaintiff had paid to the Defendants upon several instruments called "peace or war policies," whereby the Defendants undertook to pay the Plaintiff the sums subscribed by them, in case preliminaries of peace were not signed between *Great Britain* and *France* on or before certain days therein named. The illegality of these wagers, as well as the right to rescind them before the time arrived which was to determine the risk, being admitted, as settled by the authority of *Aubert v. Walsh*, ante, 3. 277. the only question in this case was, whether there had been a sufficient renunciation of the contract by the Plaintiff under the following circumstances. *Walsh* and *Nesbit* were partners, and after the subscription of the policies committed an act of bankruptcy, a commission was sued out, they were declared bankrupts, and many of the creditors proceeded to prove their debts under the commission. Amongst others, the Plaintiffs, by their solicitor applied to prove as a debt the sums they had paid as premiums on these policies; but the commissioners being of opinion that these sums were paid on an illegal consideration, and could not be recovered back, rejected the proof. The Plaintiff had not in express terms made any declaration to the Defendants of his intention to rescind the policies. The commission was soon afterwards superseded by consent of the creditors. The jury, upon the trial of the cause at *Guildhall*, before *Mansfield* C. J., at the sittings after *Michaelmas* term 1811, found a verdict for the Plaintiff.

Lens

*Lens* Serjt. in *Hilary* term last had obtained a rule *nisi* to set aside this verdict and enter a nonsuit, upon the ground that there was no proof that the contract had been rescinded before the determination of the event insured.

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*Shepherd* and *Marshall* Serjts. in this term shewed cause, and contended that the claim made before the commissioners to receive back the premiums was the most open, public, and notorious renunciation of the contract that could have been made. The rights of the bankrupt were at that time all well vested in the commissioners, therefore it would have been idle to have then notified to the Defendants the renunciation of the contract, since they had no disposing power over the estate. The act of the commissioners in rejecting his claim was immaterial; if they had allowed it, which they would have certainly done could they then have foreseen the decision of this Court in the case of *Walsh v. Nesbit*, that act of third persons could not have made any difference. It is clear that an action brought would have sufficiently rescinded the contract, and pending the commission which had regularly issued, a claim to prove under it was equivalent to an action.

*Lens* and *Best* Serjts. *contra*. The commissioners having refused the application, the matter remained in the same state as it was in before the application made. It was made, indeed, only with a view of hedging, as the Defendants were then unable to pay, and this action, which, if brought in time, would have rescinded the contract, was not brought till after the renunciation made.

MANSEFIELD C. J. I never could understand where was the good sense of altering the law from that which it

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it certainly before was, that if persons entered into an illegal contract, they were not to have the aid of the law to help them out of their difficulties, but must be left to get out of them as well as they could; but the law is now changed, so that if a man declares his dissent from an illegal wager before the event happens, even if it is the very day before the event happens (a), he

(a) *Quære* whether this inference from the cases decided be not somewhat larger than they warrant: perhaps the line may be, that so long as the risks remains unaltered, (not so long as the event has not happened,) the contract may be rescinded: in some cases every hour's lapse of time varies the risk, in others the risk remains unaltered for a long time, e. g., so soon as a state lottery is created by act of parliament, an illegal wager may be laid that a particular ticket will be drawn a prize; there are three months before the drawing: on the last day before the drawing, the chance that that number will be drawn a prize, remains precisely the same as before. An illegal wager is made, that the Emperor of France, aged 47, will not live ten years: at the end of nine years, eleven months, and twenty-nine days he is alive, and the event is not then yet determined; but the value of the risk is very greatly altered; the value of the probability that he will attain that age, is, at the time of making the wager, (assuming that emperors live as long as French annuitants in general,) only 826, or little more than four-fifths of certainty; \*at the end of nine years eleven months and twenty-nine days, it is

more than 999, or more than a thousand to one. So, on events which requires much space and time to effect them: as a bet that a French army shall march into Delhi within three years: if no French expedition leaves Europe within two years and eleven months, it is morally impossible that the conquest can take place within the time; yet the event has not happened. If a *locus penitentiae* is allowed in such cases, and the contract may be determined at any time before the event has expired, instead of repressing the spirit of gaming, it gives the fraudulent gambler an opportunity of knowing, in all cases, with moral certainty what the event will be, before he makes his final election whether to draw his bet or proceed with it. In the case of *Aubert v. Walsh*, it was not adverted to by the counsel on either side, that the risk did not remain unaltered; but in truth, as the making of peace is a work of time, being usually preceded by the mission of ambassadors, and various other diplomatic forms, it could not be laid upon the last day before the expiration of the wager, if no ambassadors had then met, that the chance then remained unaltered of the preliminaries of peace being signed

he may recover back the money he has paid. In this case, I think the Plaintiff did tell his intention of rescinding the contract to the Defendant himself, when he told it to the commissioners. To whom did he apply? To the commissioners, who were trustees for the creditors at large, and after that trust performed, they were trustees of the surplus for the bankrupt. I think therefore that the notice given to them sufficiently declared to the bankrupt that the Plaintiff rescinded the contract.

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HEATH and CHAMBRE Js. coincided in opinion that the contract was rescinded.

signed on the morrow. If the party who pays money upon an illegal wager may recover it back after the relative condition and chance of the two parties is at all changed, it is difficult to assign a reason for the distinction why he may not also recover it back after the event is absolutely determined.

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AUBERT v. WALSH and Another.

April 21.

THIS was an action for money had and received, brought to recover back the premiums paid upon policies similar to those in the last case. The Defendants gave notice of set-off, and proved on the trial numerous checks drawn by the Defendants on their bankers, and delivered to the Plaintiff, to whom the bankers had paid them. It appeared there had been transactions as between these parties to a very large amount. The Plaintiff objected that it was necessary to shew on what consideration, or for what purpose, these checks were delivered, in order to apply them to this set-off; and that they did not prove any payment, without evidence of the circumstances under which they

Proof of the delivery and payment of a check to the Plaintiff is not sufficient evidence of a debt in order to support a set-off, unless it be shewn upon what consideration, and under what circumstances, the check was given.



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were given. A verdict passed for the Plaintiff, and a rule *nisi* had, in the last term, been obtained to set it aside.

*Shepherd* and *Best*, Serjts. would now have supported the rule, but the Court interposed.

MANSFIELD C. J. I am sure I remember a case before Lord *Mansfield* C. J. in which a check given was produced as evidence of a debt, and his Lordship held that that alone was not sufficient.

CHAMBRE J. All our accounts would be in inextricable confusion if such evidence were allowed.

Rule discharged.

*Lens* and *Marshall* Serjts. *contra*.

April 22.

DRIVER, on the Demise of BERRY, v. THOMPSON  
and Another.

A feme covert, who surrenders copyhold lands, ought previously to be examined separately from her husband, by the steward of the manor.

But by special custom she may be separately examined before two customary tenants.

If a copyhold be surrendered to such uses as a feme covert shall, by will or codicil, appoint, a paper purporting to be a will, though made by her, living her husband, is a good execution.

THIS was an ejectment, brought to recover a copyhold cottage and eleven acres of land, in the parish of *Barnby-on-the-Marsh*, in the county of *York*. The Plaintiff claimed as the nephew and devisee of *Mary Thompson*, deceased; the Defendant was the heir at law of *Joseph Thompson*, her husband. Upon the trial of this cause, at the *York* summer assizes 1811, before *Chambre J.*, the evidence was, that "at a court held on the 6th day of *December* 1806, it was found that

*Joseph*

*Joseph Thompson* and *Mary* his wife, (she the said *Mary* being first examined before two customary tenants and consenting,) by surrender in writing, dated the 28th of *June* then last, surrendered the premises, (of which they were seised in right of the wife,) to the use and behoof of the said *Joseph Thompson* and *Mary* his wife, and their assigns, for the term of their natural lives, and the life of the survivor of them; and from and immediately after the decease of the survivor of them, to the use of such person or persons, and for such estate and estates, uses, intents and purposes, and under and subject to such powers, provisos, payments, limitations, restrictions, and agreements, as the said *Mary*, the wife of the said *Joseph Thompson*, had already, or thereafter should, in and by her last will and testament, or any codicil thereto, to be by her duly executed in the presence of, and attested by three or more credible witnesses, give, devise, direct, limit, or appoint the same." *Mary Thompson*, by her will, dated the 5th of *November* 1807, devised "all her messuages, cottages, lands, grounds, tenements, and hereditaments, whatsoever and wheresoever, as well freehold as copyhold, (the copyhold having been duly surrendered to the use of her will,) unto her nephew *John Berry*, (the Plaintiff's lessor,) his heirs and assigns for ever," subject to certain legacies and annuities. *Mary Thompson* died on the 21st of *November* 1809, her husband *Joseph* died on the 5th of *April* 1811. The title thus principally depending on the documentary evidence, the parties merely laid before the judge the briefs containing copies of these documents, and little other evidence was given: for the Plaintiff were cited at the trial the cases of *Compton v. Collinson*, 1 *H. Bl.* 334., and *Taylor v. Phillips*, 1 *Ves.* 229.; and for the Defendant was cited the case of *George, an demise of Thornbury, v. ———*, *Ambl.* 627. A verdict passed for the Plaintiff, subject to the objection made

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for the Defendant at the trial, that a feme covert could not make a will topass real estate.

Clayton Serjt., in *Michaelmas* term 1811, moved for a rule *nisi* to set aside the verdict and enter a nonsuit, upon these grounds; first, be urged that a feme covert cannot in general make a will; and though she may dispose of real property, either freehold or copyhold; yet in either case, it is necessary that there should be a private examination, in order to ascertain that she is not unduly influenced by her husband. In the case of copyhold land this examination must be made by the steward. *Eriſh v. Rives*, *Cro. El.* 717. 3<sup>rd</sup> res. "Admitting that the surrender of a feme covert, being sole examined, should bind her by the custom, whether such a surrender upon her examination made before two tenants of the manor, such surrenders before them being used to be made, shall be good. And all the Court agreed, that by especial custom to warrant it, it may be good, otherwise not. Because it is a judicial act more proper to be done in court." For the law presumes that the steward will take care to put the proper questions, but two customary tenants may be ignorant men, not knowing to what point they shall direct their enquiries. And in the present case there was no evidence given of any such special custom within the manor, to warrant this departure from the general law of the land. Secondly, the surrender is bad, because a feme covert cannot make a will, and although she may make a declaration of uses, yet this instrument purports to be a will, and is therefore bad. [*Heath J.* A power reserved to a feme covert to declare uses of her own estate, is to be construed favourably.] Thirdly, in the event which has happened, of the husband surviving the wife, the appointment is void, because it exceeds the power. The feme covert makes the will, living her husband, the power is, that  
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in case she survives her husband, she may make a will.

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MANSFIELD C. J. There seems to be great weight in the first point : as to the other, the copyhold estate passes by the surrender ; not by the will.

Rule nisi.

*Shepherd* Serjt. on this day would have shewn cause, but was stopped by the Court, who expressed a desire to hear *Clayton* in support of the rule.

*Clayton* would have insisted on his first point, but [*Chambre* J. observed, that it had been for the first time suggested since the trial. *Mansfield* C. J. We must presume that the reason why the objection, which is a very obvious one, was not made at the trial, was, that both parties well knew there was such a custom within the manor, and that if the objection had been made, it would, no doubt, have been answered by proving the custom.] Secondly, the power is not well executed by *Mary* in her husband's lifetime, for it was to be executed by will ; and until she should survive him, she was incapable to make a will. Powers must be strictly pursued. *Lord Darlington v. Pulteney*, 1 *Cowp.* 260. [*Mansfield* C. J. It is unnecessary to cite cases to prove that a power to appoint by deed cannot be well executed by will, and *vice versa*, which is all that is established by that case. But your objection here is, that this power is to be executed by a will, and that a feme covert cannot make a will. But a thousand cases, in all the Chancery reports, arise on the wills of femes covert ; and the courts of equity have gone even so far as to say that a woman who has a separate estate may make a will without a power.] *Clayton* would have

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cited *Eyre v. Longford*, 1 P. Wms. 740. 3rd res., and other cases, but the Court

Discharged the rule.

## (IN THE EXCHEQUER-CHAMBER.)

April 22.

HAMMEL v. ABEL.

Interest allowed on the affirmance of a judgment obtained for the balance of a merchant's account, and for interest on that balance.

**GASELEE** moved for interest on the affirmance of the judgment of the Court below. The action was *assumpsit* on the common money counts, for the balance of an account between merchants, and there was a count for interest on that balance. The judgment in this case was by default. He cited *Marshall v. Poole*, 13 *East*, 98.

Rule absolute.

## (IN THE EXCHEQUER-CHAMBER.)

April 22.

MIDDLETON v. GILL.

Interest allowed upon the affirmance of a judgment for goods sold and delivered, which were to have been paid for by a bill, the bill not having been given.

**GASELEE** moved for interest on the affirmance of a judgment.

**Puller** opposed it on the ground that the action was brought for non-payment of the price of a quantity of *Riga Rhine* hemp, to be paid for by a bill of certain date, to be accepted by the Defendants. The Plaintiffs tendered a bill for acceptance, which the Defendants refused to accept, upon the ground that the whole quantity of hemp had not been delivered.

**MANSFIELD C. J.** That would have been a defence on the trial, if you had proved it; but as the judgment

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is

is for the plaintiff below, the fact must have been otherwise. If the bill had been delivered, it would have borne interest from the time it became payable, and we cannot permit a person to take advantage of his own wrong, and after refusing to pay for his goods, to pay the less when compelled by law, because he has been injurious.

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Rule absolute.

GOLDSMITH v. LEVY and Another.

April 23.

THIS action had been commenced against two partners, one of whom was resident at *Surinam*, and the Plaintiff proceeded by summons and *distingas* against the goods of the two Defendants, whereupon the Defendant resident here appeared for himself, but said he had no authority to appear for his partner; and *Peff* Serjt. had on a former day obtained a rule *nisi* to set aside the *distingas* and subsequent proceedings, and to restore the sum of 40s. which had been levied, upon an affidavit that the goods seized were the goods of the Defendant who appeared, and that there were no joint effects of the two Defendants in *England*.

There is no other mode of proceeding against two, of whom one is abroad and the other will not appear for him, but appears for himself only, than by proceeding to outlawry against him who is abroad.

*Shepherd* Serjt. opposed this rule, on account of the inconvenience which would ensue, if there were no way of proceeding against two partners, one of whom was absent from *England*, except by proceeding to outlawry; and he laid the blame of this on the late statute 51 G. 3. c. 124.

MANSFIELD C. J. I do not know how we can help the Plaintiff. The act of parliament has made no difference in the law in this respect. Any person who

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forefaw this difficulty would never deal with a trader here who has a partner resident abroad, unless the trader would agree that the purchaser may compel an appearance of both partners by *disfringas* on the goods of the partner resident in *England*.

Rule absolute.

April 25.

The KING v. COLLICOTT.

If a person engraves a counterfeit stamp similar in some parts, dissimilar in others, to the legal stamp, and cutting out the dissimilar parts, utters the similar parts as genuine, concealing the space whence the dissimilar part is cut out; this amounts to a forgery and uttering.


In describing the offence of forging a stamp, it is enough to describe it as a stamp provided and used in pursuance of an act of parliament, without setting out the impression or inscription, or naming the amount of duty denoted thereby.

THE prisoner was indicted on the statute 44 Geo. 3. c. 98. for feloniously forging and counterfeiting, and procuring to be forged and counterfeited a certain mark, provided and used in pursuance of a certain act of parliament, intituled, "an act to repeal the several duties under the commissioners for managing the duties upon stamped vellum, parchment and paper, in *Great Britain*, and to grant new and additional duties in lieu thereof," thereby then and there to defraud his majesty of the duties charged and imposed by the said act, against the form of the statute." The second count charged him with feloniously uttering a certain paper with a forged and counterfeit mark, which mark was forged and counterfeited to resemble a certain mark provided and used in pursuance of that act, (setting out the title,) the prisoner, at the time he so uttered the paper, with the said forged mark thereupon, well knowing the same mark to be forged and counterfeit. There was another count for vending and selling a paper with a forged mark knowingly, and three other counts similar to the former, except that they described it as a stamp. The prisoner was tried at the *Old Bailey* sessions in *February* 1812. The evidence was, that the prisoner was a vender of patent medicines, and sold certain boxes of *Dr. Jebb's* pills, with the counterfeit label on them. Many of these counterfeit labels

were

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were found in his possession, entire. They were of an oblong form, coloured with red ink, similarly to the stamps for patent medicines issued by government, and having, like them, at one end the word "stamp," and at the other end the word "office," printed transversely, and on a blank on the first-mentioned end, printed longitudinally, the words "value above 1s.," and on a blank on the other end, also printed longitudinally, the words "not exceeding 2s. 6d.," as the legal stamps also have; and having in the centre a white circle, which in the counterfeit was all blank, except that it bore the words, "*Jones, Bristol*," printed thereon; whereas in the legal stamp, that circular space was circumscribed with a red ring, and inscribed with another smaller red ring, and in the circular space between the two rings were printed the words, "Duty three-pence ;" and on the space within the inner red ring on the legal stamp was impressed in red ink the figure of a crown. When the prisoner used these stamps he cut out the circular space bearing the words "*Jones, Bristol*," and pasted on the packets of medicine the two ends of the label without the middle part, and concealed the deficiency of that part by a waxen seal extending over it. Stamps were uttered in this state by the prisoner affixed to the pills which he sold. The jury found him guilty. But two objections were made for the prisoner; first, that the forged stamp was not a sufficiently near resemblance of the genuine stamp to constitute forgery; secondly, that the indictment was deficient in this respect, that it did not set out or describe what the stamp was that was forged. The case was argued this day in the Exchequer-chamber, before ten Judges, *Lawrence* and *Bayley* Js. being absent, by

*Curwood* for the prisoner. The act directs the commissioners to use a stamp denoting the amount of duty to be



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be paid. The words "Duty three-pence" are therefore an essential part of the stamp. And to make this an offence against the act, the prisoner must counterfeit, at least, all the essential parts. If there had been evidence of what the centre of the stamp produced at the trial had been, that might have been for the consideration of the jury, whether there was or was not a sufficient resemblance to enable them to say it was an imitation of the genuine stamp. It is not indeed necessary that the counterfeit should be a perfect resemblance; but it is necessary it should have so much general resemblance as to deceive an ordinary observer. If the difference be conspicuous, it is no forgery, as in the case of a *Fleet* bank note, for which no indictment could be supported, although some parts of it are so like a genuine bank of *England* note, that they might deceive any one. *Jones's* case, 2 *Eaft. P. C.* 883. This resembles the case of coining, where under an indictment for forging half-a-crown, evidence of the forgery of a three shilling bank token could not be received. Secondly, the indictment ought to have set out a description of the stamp forged, or a *fac simile* of it, as is done in the case of forgery of bank notes. If the indictment had set out the part omitted, the distinction would have been apparent, and then there would either have been a variance upon the evidence, or the indictment would have been certainly bad on the face of it.

*Gurney* for the crown. This is the first case on this statute, therefore there were no precedents to follow; but this is analogous to the case of *Rex v. Fuller*, 1 *Bos. & Pull.* 180., where I argued for the prisoner, that it was necessary in an indictment for endeavouring to seduce soldiers from their allegiance, to shew the means by which the prisoner endeavoured to seduce them; but the Court held it unnecessary. The statute 41 *G. 3.*  
 c. 39.

c. 39. was intended to comprehend the case where a prisoner was intending to make and utter an incomplete thing to be finished by another, but in this case the thing is uttered as complete.

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*Curwood* in reply. This, when it was originally made, was perfectly distinguishable from the legal stamp: the prisoners calling it a stamp, on offering, or vending it as such, will not make it a sufficient resemblance; for that feature existed in *Jones's* case, who called his note a bank note, and put it away as such.

LORD ELLENBOROUGH C. J. How can the anterior state of this thing make any difference? If the part of difference is extinguished, it is the same as if it had never existed. Suppose a man were to coin a coin with the name and head of a foreign prince, and then efface it, so that it would look like a defaced *English* coin, would not that be a forgery? In *Jones's* case there was not the similitude to deceive: it did not, on the face of the bill, purport to be what he said it was.

MANSFIELD C. J. *Jones's* crime was that of telling a falsehood.

*Cur. adv. vult.*

The Judges held the offence of uttering a forged stamp was complete, by uttering thus much of it: but there being a question whether the offence was properly laid in *London*, where the prisoner was indicted, his house being in *Middlesex*, where he had delivered the goods to his servant to carry to an inn in *London*, in order to be sent by a carrier to an innocent purchaser at *Bath*; and there being a difference of opinion among the Judges, although a majority held the offence complete in *London*, no sentence having been passed, he was tried again upon another indictment for an offence unquestionably committed in *London*, and convicted.

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## (IN THE EXCHEQUER-CHAMBER.)

*April 25.*

The KING v. HAMMON.

A banker's clerk enters a fictitious sum in the ledger to the credit of a customer, and tells him he has paid that sum to his account; and on the faith of it obtains from the customer his check on the bankers, which the prisoner pays to himself by bank-notes from the till, and enters in the waste-book a true account of the check, drawer, and notes, as paid to "a man." This was held a felonious taking of the notes from the till.

THE prisoner was tried at the *Old Bailey* sessions in February 1812, before *Heath* and *Bayley* Js., upon an indictment which charged that he, in the dwelling-house of *Thomas Birch* and *Abraham Henry Chambers*, feloniously did steal two bank notes for the payment of 50*l.* each, and of the value of 50*l.* each, the property of *T. Birch* and *A. H. Chambers*, the money payable upon the notes being then unsatisfied to them the proprietors, against the form of the statute. Upon the evidence the circumstances of the case appeared to be these. The prosecutors were bankers, and the prisoner was their fourth clerk. It was his ordinary department to keep and attend to a book called the cash book; but sometimes when urged by pressure of business, or on other particular occasions, he did pay away money for checks at the counter. The course of business in their bank with respect to the keeping of their accounts, was this: whenever monies were paid out of or into their bank, the first entry of them was made in a book called the waste book, on the debtor side of which were kept two columns, in the one was entered the description of the person receiving the money, the numbers and dates of the notes or sums paid out to him, and the amount of each; in another column was entered the description and amount of the instrument or order in satisfaction of which the sum was so paid out, and on the creditor side in like manner was entered the description of the person paying money into the bank, and the dates, amount, and numbers of the notes paid in. From the waste book the amount of the payment was transferred to a book called the cash book,

in

in which, on the creditor's side, was nothing more than one column, headed "Cash" in the top line, and in each following line the abbreviation "D<sup>s</sup>," and in another column the sum of each payment. And on the debtor side of this book was entered the name of the person paying the money and the sum paid in. The cash book was cast up every evening, and formed the regular check against the amount of the money in the till. From the cash book the entries of payments were transferred to a book called the ledger, in which were kept distinct accounts between the bankers and each of their customers, and a fourth book, called the customers' book, belonging to each individual customer, contained a duplicate of that person's account in the ledger. All the transactions which took place during the hours of business in every day, were in the evening entered in the cash book, and thence transferred into the ledger, from whence the account was at intervals transferred into the customer's book. A witness named *Vale* kept a banking account with the prosecutors, and the prisoner had persuaded him from time to time to give the prisoner accommodation bills, for payment of which the prisoner provided by pretended payments made to *Birch* and *Chambers*, to the account of *Vale*. On the 19th of *December* 1811 the prisoner called on *Vale* and delivered to him his customer's book, wherein he said he had lately made up *Vale's* account to that time, and had therein given *Vale* credit for a sum of 200*l.*, which the prisoner said he had lately paid in to *Vale's* account; the book did in fact contain the entry of 200*l.* to the credit of *Vale's* account, in the prisoner's hand-writing; and upon the credit of this sum *Vale* gave him a bill for 200*l.* at two months date, on a stamp which the prisoner produced: on the 10th of *January* 1812 the prisoner called on him again, and brought him back that bill, saying he did not then want it, but requested to have in lieu thereof

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thereof a check drawn by *Vale* on *Birch* and *Chambers*, in favour of *Plamer* or bearer, for 100*l.*, and a bill for 100*l.*, both of which the witness accordingly gave him, and received back and immediately destroyed the bill for 200*l.* The prisoner had been very assiduous in assisting the clerk whose department it was to pass the ledger, in performing that service for him, particularly in that volume in which *Vale's* account was kept, and in that ledger, under the date of 19th *December*, appeared in the prisoner's hand-writing an entry of 200*l.* to the credit of *Vale's* account, correspondent with that which he had entered in the customer's book, but no corresponding entry to that sum appeared either in the cash book or the waste book, nor had *Vale* in fact paid in any such sum. On the 10th of *January* 1812, the prisoner taking advantage of a press of business which detached some of the clerks whose ordinary business it was to pay and receive money at the counter, stationed himself at the counter for a short time, during which he made four entries in the page of the waste book which contained the entries of monies paid: the second of them was in the column denoting the description of person paying, and notes received; "Man 50*l.* No. 15451. and 50*l.* No. 10790—100*l.*;" and opposite to it, on the other column, containing the description of the instrument upon which it was paid, "100*l.* *John Vale*," which was understood to mean, that on that day a man had brought a check of *John Vale's*, and that it was paid to him by those two bank notes of 50*l.* each. The two notes in question had been paid into the house in the course of the same day, and were proved to have afterwards been in the possession of the prisoner; so that it appeared that he had taken them out of the drawer and put them into his pocket, in payment of the real check for 200*l.* so given him on that day by *Vale*, and which check was found, together with the other checks which the house had that day paid.

Upon

Upon the 11th of *January* 1812 there was an apparent balance upon the account of *Vale* in his favour, although in reality when the amount of the several fictitious sums for which credit had thus been given him in repeated instances, was deducted, he was debtor to the bankers in several hundred pounds. For the prisoner, it was objected, that as these notes had been paid by the prisoner in the usual course of business in discharge of a real instrument, drawn by a customer who had a right to draw it on his bankers, and which they were compellable to pay, if he had a balance there, the notes were properly and legally paid away; and although there was gross fraud, there was no felony. For the prosecutors it was insisted, that as the prisoner had obtained possession of the check by fraud, and had fraudulently entered the fictitious credits, without which the check would never have been drawn, or, if drawn, never could have been honored, this amounted to a felony. The Court reserved the point, as being a new case, for the consideration of the twelve Judges; and the jury found the prisoner guilty, also finding the facts, that the prisoner paid himself the money, and that at the time he made the false entries in the ledger and customer's book, he did it fraudulently, with design to enable himself to get the money of *Birch* and *Chambers*: they also would have added as a fact, that as the prisoner had the check for 100*l.*, he had a right to pay himself the money; but the Court told them that was a question of law, of which the prisoner would have the benefit.

The case was argued on this day before ten Judges, *Lawrence J.*, who was indisposed, and *Bayley J.* (being absent) by

*V. Lawes* for the prisoner. Admitting the representation of the prisoner to *Vale*, that he had paid 200*l.* to his credit,

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credit, (on the faith of which he obtained this check,) to be false, it amounts only to this, that he obtained from *Vale* upon false pretences a check for 100*l.*: but the fraud was on *Vale*, not on *Birch* and *Chambers*. If the transaction had stopped short with the fictitious entries in the bankers' books, it would have created no fraud, it would not have been an indictable offence. In consequence of those entries a genuine check is drawn *bonâ fide* by *Vale* upon the credit of the then existing balance, which he had a right to draw, and these notes are paid in satisfaction of that check. The consequence is, that *Vale* has overdrawn his account, and a debt is created from *Vale* to *Birch* and *Chambers*, for which they may bring an action against *Vale* for money lent or paid. The bankers adopt the transaction, and enter it in their other books. Although it was not the ordinary business of the prisoner to pay checks presented for payment, yet he sometimes did perform that office on particular occasions. Taken therefore, as between the prisoner and the bankers, this was merely an application made by him of their property in the usual course of business, and was not a taking *invito domino*.

*Gurney, contra*. All the contrivance which is practised, is not practised for the purpose of getting the money out of the drawer, but for the purpose of concealing the taking. The check is drawn by the prisoner for his own purpose, and is, so far as he is concerned, his own making.

Lord ELLENBOROUGH C. J. Whether a man opens the drawer at once and takes the money out, or whether he uses a circuitry of contrivance in order to conceal the act, it is all the same. *Vale* was either very imprudent or very fraudulent, to let another man keep cash in his account, and to have what may be called a rider on his own

own account. This is *fraudulenta contructio alienæ rei invito domino*, every part of the definition is satisfied: the entry the prisoner relies on as making it the act of the house, is his own act. It is only a foolish shuffle to escape detection: he gains nothing but time by it: he takes it out with the right hand, and pays it to the left.

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MANSFIELD C. J. He steals two notes out of the drawer, and uses this foolish contrivance afterwards to cover it.

LE BLANC J. It was left to the jury, and they have found the fact.

WOOD B. *Hammon* had money, and as is frequent among bankers' clerks, requested *Vale's* permission to put it into the bank to *Vale's* account, and to draw it out by checks drawn by *Vale*.

*Cur. adv. vult.*

The Judges held that the prisoner was properly convicted.

REX v. EDWARDS.

April 25.

THE prisoner was indicted for maliciously shooting at *Lewis Roberts* with intent to kill him. Upon his trial before *Wood B.*, at the *Lent* assizes, 1812, for the county of *Monmouth*, after the prisoner had been indicted and arraigned, and the jury charged, and while the prosecutor was giving his evidence, one of the jury-men fell down in a fit, and a medical man who examining to verdict, the Court of oyer and terminer may discharge the jury, and convict him.

If after indictment, arraignment, the jury charged, and evidence given, on a capital offence, one of the jury-men becomes incapable through illness, of proceeding

But *semble*, it the prisoner shall be again allowed his challenge to each of the eleven former jury-men.



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mined him, stated upon oath, that it would be improper for him to proceed with his duty as a jurymen on that day, whereupon *Wood B.* discharged that jury, and directed a new jury to be sworn, consisting of the same eleven persons who remained of the former jury, and another. *Clifford*, for the prisoner, upon a supposition that the jurymen would soon be in a state to return, had consented that another should be sworn in his room, but learning his inability to attend, he retracted that consent; and objected that a jury having been once sworn and charged in a criminal case, they could not be discharged without giving a verdict, nor another jury sworn, but *Wood B.* over-ruled that objection. *Clifford* then challenged the eleven, but the learned Judge over-ruled that objection also at first; but afterwards, *Clifford* having left the court, *Wood B.* asked the prisoner, as each jurymen came to the book to be sworn, whether he had any cause of challenge to him, the prisoner's answer was that he liked them all very well. This point was now argued before all the Judges of *England* except *Mansfield, C. J.*, who was absent at *Guildhall* at the sittings, and *Lawrence J.*, who was indisposed. [Lord *Ellenborough C. J.* observed that, supposing that the refusal to allow *Clifford* his challenge were objectionable, yet it was now become immaterial, inasmuch as the prisoner had the advantage of the point, in being permitted to challenge the eleven, contrary to the first opinion of the learned Baron.]

*Clifford*, for the prisoner. The only point then is, that a judge having charged a jury in a criminal case, cannot discharge that jury, and try the prisoner again on the same indictment before another jury. All the authorities on this point are collected in *Kinlock's case*, *Fest.* 22.; and although the opinion of Lord *Hale*, cited *ibid.* 30., is against the prisoner, yet the better opinion is the other way.

way. 1 *Inst.* 227. b. "A jury sworn and charged in case of life or member, cannot be discharged by the Court or any other, but they ought to give a verdict."

3 *Inst.* 110. "If any person be indicted of treason, or of felony, or larceny, and plead not guilty, and thereupon a jury is returned and sworn, their verdict must be heard, and they cannot be discharged." *Rex v. Jeffs*, 2 *Str.* 984.

*S. C. Foster*, 24. It was refused to withdraw a juror on an indictment for barratry, because the punishment is infamous. *Palm.* 411. *Jeffrys v. Tindall*, 21 *Vin.* 338.

pl. 3. "In capital cases a juror cannot be withdrawn, though all parties consent to it. *Ibid.* pl. 4. 4 *Bl. Com.* 360. "When the evidence on both sides is closed, and indeed when any evidence hath been given, the jury cannot be discharged (unless in cases of evident necessity), till they have given in their verdict." *Hawk. P. C.*

book 2. c. 47. f. 1. "It seems to have been antiently an uncontroverted rule, and hath been allowed even by those of a contrary opinion to be the general tradition of the law, that a jury sworn and charged in a capital case, cannot be discharged, without the prisoner's consent, till they have given a verdict." [Lord *Ellenborough* C. J. The rule in *Blackstone* admits the exception in case of necessity, which comprehends the present case. The case of the adjournment at the *Old Bailey* upon the trials for high treason is well remembered. The Court takes notice that the strength of man is not sufficient to go through such continued labour without meat and sleep, and that is one of the cases of necessity. In the case of *Hardy* it was done by consent, but in the case of *Stone*, and all the others after the first, it was done by the Court *proprio marte*; and very wisely too: the learned Judge who then presided, said, he would not permit it to rest on so weak a ground as consent.] The argument is not that the Court cannot adjourn and proceed the next day with the same jury. In 2 *Hale P. C.* 294. it is said that

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“ nothing is more ordinary, than after a jury sworn and charged with a prisoner, and evidence given, that the Court may discharge the jury of the prisoner, and remit him to the gaol for further evidence:” but *Foster* says, p. 30. “ It is not now a question, nor, I hope, will it ever be a question again, whether, in a capital case, the Court may, in their discretion, discharge a jury after evidence given and concluded on the part of the crown, merely for want of sufficient evidence to convict; and in order to bring the prisoner to a second trial when the crown may be better prepared. This was done in the case of *Whitebread* and *Fenwick*, and it certainly was a most unjustifiable proceeding, but I hope it will never be drawn into example.” But the question there was, whether in a capital case, where the prisoner may make his full defence by counsel, the Court may not discharge the jury upon the motion of the Defendant’s counsel, and at his own request, and with the consent of the Attorney-General, *before evidence given*, in order to let the prisoner into a defence, which, in the opinion of the Court, he could not otherwise have been let into. In that case that learned Judge, with good sense, confined himself to the very case in argument, “ to prevent injustice, and before evidence given.” The whole result of the case is, what *Foster J.* held, that a jury could not be discharged except where it was for the advantage of the prisoner. But it cannot be said that when a jurymen falls sick and another is put to supply his place, that is for the benefit of the prisoner. *Actus dei nemini nocet*, the sudden illness is a god-send, of which the prisoner ought to have the benefit. This twelfth jurymen, if he had not been discharged, must have consented to the verdict before it could have been given: it is possible that his superiority of reason might have convinced the other eleven of the prisoner’s innocence. If while the jury were considering their verdict, one of them had died, could the Judge have

have tried that case again? In that case, as in this, the commission would be at an end; and there is no mischief ensues to the community; the prisoner might be again indicted; he could not plead *autrefois acquit*, nor *autrefois convict*.

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The Court, stopping *W. E. Taunton*, who was to have argued for the crown, said, that it had been decided in so many cases, that it was now the settled law of the country, and gave judgment against the prisoner (a).

(a) See *Ann Scalbert's case*, *Leach*, 706.

DOE, on the Demise of TOOLEY and Wife, v.  
 GUNNISS.

April 27.

THIS was an ejectment tried at the *Lent* assizes 1812, for the county of *Lincoln*, for the recovery of certain lands in *Butterwick* in that county, when a verdict was taken by consent, for the Plaintiff, subject to the opinion of the Court on the following case.

*Richard Gunnis* being seised in fee of the premises in question, by his will dated the 13th of *January* 1767, and duly executed and attested, devised as follows. "First, I give to my loving son *Richard Gunnis*, and unto my son *George Gunnis*, all those my lands and tenements lying in *Butterwick* in the said county of *Lincoln*, (being the premises in question,) jointly to be divided between them; for and during the term of their natural lives, subject to such incumbrances as follows: My will and desire is, that the said *Richard Gunnis* and *George Gunnis* shall pay, or cause to be paid out of the said estate unto my daughter *Isatt Clayton*, widow, the sum

Devise to two jointly, to be divided between them, for their natural lives, and after their decease, to such child and children of the two, of their bodies lawfully begotten, share and share alike; and in failure of such issue, to such child of *W. G.*, there being a child of one of the two living at the time of the devise, and death of the testator; this devise creates an estate for life in the two, and the same in the child

and the remainder over failing, the heir at law of the testator took the fe

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of 3*l.* a-year, share and share alike, to be paid quarterly, the first payment to commence from the day of my death; and in failure of any such payment or payments, my said daughter *Isatt Clayton* shall have full power to enter upon any part of the said estate above-mentioned, for payment thereof; and if either the said *Richard Gunniss* or *George Gunniss* shall die, to go to the longer liver of them, and after their decease to such child or children of the said *Richard Gunniss* and *George Gunniss*, of their bodies lawfully begotten, share and share alike; and in failure of such issue, to go to such child or children of my son *William Clayton*, deceased, to be equally divided between them. The testator also gives unto his grandson *Richard Gunniss*, (who is the testator's heir at law,) the sum of 5*l.*, to be paid by his executors within six months after his decease. The testator had two wives. The said *Richard Gunniss*, the grandson, is a descendant of the first venter, and the said *Richard Gunniss* and *George Gunniss*, the devisees, were the issue of the second venter. The testator died soon after making his will. *Richard Gunniss*, one of the devisees named in the will, married *Elizabeth Oldham*, by which marriage there was issue an only child, *Sarah*, who was living when the testator made his said will, and at the time of the testator's decease. The said *Sarah* married *John Waddington*, and by that marriage had one daughter named *Hannah*, who married *John Tooley*, which said *John Tooley* and *Hannah* are the lessors of the Plaintiff. *George Gunniss*, the other and surviving devisee, died without issue. *Richard Gunniss*, the Defendant, who is heir at law of the testator, rented the premises of the said *Richard Gunniss* and *George Gunniss*, the devisees, during their lives and the life of the said *George Gunniss* the survivor, who died about 12 years ago, and the Defendant hath continued in possession thereof ever since. If the lessors of the Plaintiff were entitled to recover the premises in question, the

verdict was to stand : if they were not so entitled, a verdict was to be entered for the Defendant.

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*Lens* Serjt. for the Plaintiff, contended that there was an estate tail by implication created by this devise either in *Richard* and *George Gunnifs*, the first devisees, or in *Sarah* the child of *Richard*. *Haydon v. Wilsbere*, 3 T. R. 372. A bond was conditioned that the Defendant's father should yearly during the joint lives of himself and any of the issue of the body of his daughter begotten by the testator, pay the interest of 500*l.*, and that his executors should upon his decease (any of the issue of the body of his daughter being living at the time of his decease) pay to the testator the sum of 500*l.* : the word issue was held to be satisfied by a grandson being then living. 1 *East*, 229. *Doe ex dem Cock v. Cooper* comes nearer to the present case than any other. [*Heath* J. In that case there was no child. This is *Wild's* case, 6 Co. 167.. If there be no issue at the time, it is an estate tail in the first taker. In this case there was a child. How can it be distinguished from *Wild's* case ?]

*Vaughan* Serjt., who was to have argued on the other side, referred to *Doe, dem. Comberbach, v. Perryn*, 3 T. R. 484., and *Hay v. Earl of Coventry*, 3 T. R. 87. as having decided this case. *Dunn, on demise of Briddon, v. Page*, cited in 3 T. R. 87., and *Goodright, on demise of Docking, v. Dunham*, Doug. 264., Lord Mansfield's judgment there, were also in point.

*Posse* to the Defendant.

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## WYNDHAM v. WAY.

By an exception of "all trees, woods, coppice, wood-grounds, of what kind or growth soever," apple-trees are not excepted.

A farmer who raises young fruit trees on the demised land, for filling up his lessor's orchards, is not entitled to sell them.

*Per Heath J.*

Otherwise of a nurseryman by trade. *Per Heath J.*

**T**HIS was an action of trespass for cutting, topping, and lopping certain apple-trees of the Plaintiff standing upon certain land, called *Leonard-Farm*. Upon the trial of the cause at the *Exeter* summer assizes 1811, before *Graham B.*, the case was, that the Plaintiff had by lease demised to *Voysey*, *Leonard-farm*, with the exception of "all trees, woods, coppice, wood-grounds, of what kind or growth soever, and all mines and quarries, opened or otherwise, and also all royalties," for a term which expired at *Lady-day* 1811. The Defendant became entitled to the remainder of the term, by marrying a woman named *Voysey*, in whom it had vested. The premises were in *Devonshire*, where almost every farm consists in greater or less part of orchards, and where it is usual for the farmers to be their own nurserymen, and to raise trees for the purpose of keeping up the orchards. The trees in question were young standard apple-trees, which had been planted during the term in a nursery, parcels of the farm. Some trees had been occasionally removed out from thence, to fill up vacancies in the orchards, and some the Defendant had sold, without question made, [which *Pell Serjt.*, in moving for a new trial, contended he had a right to do. *Heath J.* Not unless the tenant were a nurseryman, and made it his trade.] The trees which remained were intended to stand as an orchard, and not to be removed any more; it was a necessary thing to head them, and was done by way of improvement by the outgoing tenant, whether before or after the expiration of his term, it did not appear, under an agreement between him and *Scaman*, a new tenant, who entered at *Lady-day* 1811, but whether he had any lease, or whether it contained an exception similarly worded, it did not appear. The trees were

were of such a growth, that they would have borne fruit in that year, if they had not been headed down. The Plaintiff contended that he was entitled to support trespass, being in possession of these trees under the exception in the lease. The Defendant contended, that the exception did not extend to nursery trees, but only to timber: that, as a nurseryman, he the Defendant had a right to cut, fell, or remove the trees; and secondly, that these trees were in the possession of *Seaman*, not of the Plaintiff, at the time of the supposed trespass. *Graham B.* held, that these, being trees of nine or ten years growth, and intended to remain for the benefit of the farm, were excepted trees: the learned Baron left the case generally to the jury, who found 20*s.* damages for the Plaintiff. Upon his report it appeared that he had been furnished with an abstract of the first count, which represented it to be for cutting and carrying away.

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*Pell Serjt.*, in *Michaelmas* term 1811, obtained a rule *nisi* to set aside the verdict, and have a new trial; [when *Heath J.* observed, that if there were a similar exception in *Seaman's* lease, the Defendant had no right to cut the trees.]

*Lens Serjt.* in this term shewed cause. These were "trees" within the literal meaning of the word: they were also trees within the spirit of the reservation, especially when considered with relation to the custom of the county of *Devon*, in which fruit trees form so important and essential a part of the property and profits of every farmer, that it is necessary that the lease should be construed in the mode most favourable for the protection of such property against injury. It will not be contended that the words of the reservation must be restricted to timber. These trees were now of nine or ten years growth, and the former tenant had never lopped them. It was at first attempted to shew that they were  
 nursery



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nursery trees, intended to be transplanted, but that pretence was disproved.

*Pell, contra*, was stopped by the Court.

MANSFIELD C. J. The Plaintiff contends that, from which, if he be correct in his argument, it will necessarily follow, that the landlord might have entered and taken away these trees, and the fruit of them; and that the tenant would have had no right to take from them a single apple. [*Lens* agreed to this consequence.] The manner in which the words occur shews that they were meant to apply to something of a different nature from these fruit trees. The exception means trees useful for their wood. It seems to me as if this action had been brought to recover for a supposed mismanagement of these trees; but it seems that you have brought the wrong form of action; for it is impossible to suppose that in *Devonshire*, when an apple-farm is let, the apple-trees are excepted.

HEATH J. It never could be the meaning of this deed, and if it was so put to a jury, they never could have understood it.

CHAMBRE J. A tenant could not prune an apple-tree according to this construction. It seems as if the learned Baron had been misled by a wrong abstract of the pleadings, for the abstract is for cutting and carrying away, but there is not a word in the declaration about carrying away (*a*).

Rule absolute for a new trial.

(*a*) The plants could not have been included in the exception in the first lease, because they were not in being at the time of the demise, but planted during the term; and every exception must be of a parcel of the then existing estate. *Co. Litt.* 47. *a.* 143. *a.* But that "apple-trees and fruit-trees pass not under the general name of trees." See *Hardr.* 309. *per Turner B.* "So, if a man grants all his woods and trees, apple-trees will not

not

not pass. *Hob.* 304. So, if a man grants all his trees, fruit trees will not pass, but by a grant of all trees except apple-trees, he shall have all other kinds of fruit trees, as pear-trees and cherry-trees," &c. *Lord Zouch v. Moore*, 2 *Ro. Rep.* 280. So 14 *H. 8.* 2. *a. pl.* 1. *per Brudnel J.* "If I grant a manor, except the wood and underwood, all the trees, great and small, are excepted, which are known by the name of wood; but apple-trees and other such like are not excepted,

because that they are not comprehended under such name of wood; for if I sell you my trees in the manor of *Dale*, you shall not have my apple-trees." *Godb.* 398. *Whitton and Weston's* case. *Crawley Serjt.* cited and admitted this, but argued that if the grant were of all trees *cujuscunque generis, naturæ, nominis, aut qualitatis*, then they would pass." The exception in the principal case is rather of all wood *cujuscunque*, &c. than of all trees *cujuscunque*, &c.

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## CALLARD v. PATERSON.

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IN this case a verdict having been found for the Plaintiff for 200*l.*, the damages in the declaration, subject to an award, the award when made directed payment of 20*l.* 7*s.* on the 22d of *April*. The Plaintiff entered up judgment on the 21st, and instantly sued out a *scire facias*, which *Onslow Serjt.* had obtained a rule *nisi* to set aside. The sum awarded, with a release to the Defendant, was tendered on the following day and refused.

Whether judgment for a sum of money awarded by an award reducing a verdict, can be entered before the day on which the payment of the sum is awarded? *Qu.*

But execution ought not to be had for it before the day of payment.

*Shepherd Serjt.* endeavoured to support the execution and the judgment, which last the prothonotary reported to be regular, because the award directed the payment of the debt and taxed costs, and the costs could not be taxed till there was a judgment, or something equivalent to it; and the Defendant could not pay costs pursuant to the award until it was ascertained what the costs were: therefore the *scire facias* only was irregular.

†  
CHAMBRE J. The Plaintiff cannot have judgment for the debt on a day before it is due. He cannot have judgment for *debitum in presenti solvum dum in futuro*.

The

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*The Court* held that the Plaintiff might well refuse to execute the release until after payment of all that he was entitled to.

The rule not impugning the judgment, but only the execution, which was confessedly irregular, *Onslow*, without discussing the regularity of the judgment, was content to make his

Rule absolute with costs.

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BROWN v. SAYCE.

If Defendant in replevin avows on a contract for 110*l.* rent, and prove a demise at 15*s.* an acre, amounting to 111*l.*, it is a fatal variance.

The rights between party and party are paramount to the rights between one of the parties and his attorney.

Therefore where one party owing rent, had obtained a verdict on a variance, and had become insolvent, the Court permitted the avowant to amend and to pay the costs of the former trial into court, as a fund for payment of his rent, in derogation of the Plaintiff's attorney's lien.

THIS was an action of replevin: the Defendant avowed, that the Plaintiff held certain lands as tenant to the Defendant at a certain rent, to wit, at 110*l.* rent, payable half-yearly. The Plaintiff pleaded, that he did not hold in manner and form, &c. Upon the trial before *Le Blanc J.* at the *Monmouth* summer assizes 1811, the instrument under which the Plaintiff held proved to be a contract for the letting of 148 acres, at 15*s.* per acre, which amounted to 111*l.* *Le Blanc J.* held that the variance was fatal, and that the issue was not proved, but reserved to the Defendant liberty to move to enter a verdict for the Defendant for the amount of the rent claimed by the avowry; subject whereto, a verdict passed for the Plaintiff.

*Shepherd Serjt.* in *Michaelmas* term 1811 obtained a rule *nisi* for setting aside the verdict, and for entering a verdict for the Defendant for the rent avowed for; against which

*Best Serjt.* in this term shewed cause. He cited *Sandys and Tubb v. Ledger*, cited in *Bristow v. Wright*, 2 *Doug.*

2 *Doug.* 666., debt for rent on a demise at 15*l.* *per ann.* The demise proved was at 15*l.* and 3 fowls : the Court held the variance fatal. Lord *Mansfield* C. J. there cites *Cudlipp v. Rundle*, *Carth.* 202. *Savage v. Smith*; 2 *Bl.* 1101. and *Shute v. Hornsey*, *B. R. E. T.* 19 G. 3. The judgment of *Buller* J. in *King v. Pippet*, 1 *T. R.* 239. and the authorities of *Churchill v. Wilkins*, 1 *T. R.* 449. and *Pitt v. Green*, 9 *Easf.* 188. are also very strong.

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*Shepherd* Serjt. was called on by the Court to support his rule : he contended that the allegation of the amount of the rent being laid under a *videlicet*, the variance was immaterial. If any rent is due the avowry may be maintained.

MANSFIELD C. J. Would not a verdict upon this issue be evidence of the amount of the rent between the same parties in another action? It certainly would. As to the *videlicet*, if the averment is a material one, the *videlicet* does not aid a variance. The contract on which the rent becomes due must be truly stated.

*Shepherd* then stated, that since the trial the Plaintiff had become insolvent and absconded; upon which the Court suggested that the Plaintiff had better pay the rent, deducting the costs of this trial, otherwise they would give the Defendant leave to amend his avowry and try the cause again.

Upon this day *Best* reporting that the Plaintiff would not agree to these terms, the Court made a rule absolute that the Plaintiff might amend, and directed that the costs of this trial should be taxed, paid into court, and impounded till further order; which *Best* opposed on the ground that the Plaintiff's attorney had a lien on the costs, and which, as he never could recover any costs from  
his

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his client, he ought not to be compelled to relinquish in favour of the Defendant : and that this practice was contrary to the general rule, and unheard of.

*The Court* held, that the rights subsisting between party and party, between whom they were then deciding, were paramount to the rights subsisting between attorney and client ; the Court had no general rule for the disposition of costs, except to mould each particular transaction so as to meet the circumstances and justice of the case, and they made the

Rule absolute for the Defendant to amend his avowry, and have a new trial, upon paying into court the costs of the first trial.

April 30.

MACKIE v. SMITH.

A writ of execution to satisfy *James* the debt awarded to *John*, amended after execution executed, upon payment of costs.

A WRIT of *capias ad satisfaciendum* had issued against the Defendant to satisfy *James Mackie*, (the real name of the Plaintiff,) 37*l.* 13*s.*, “ which by the Court was awarded to the said *John*.” *Vaughan* Serjt. having obtained a rule *nisi* to discharge the Defendant out of execution for this irregularity, *Shepherd* Serjt., who was to have shewn cause, was permitted, on the authority of *Hunt v. Kendrick*, 2 *Bl.* 836., to amend the writ, but upon the terms of paying the costs of this application, because he ought to have applied to amend in the first instance, as soon as the service of this rule *nisi* apprized him of his mistake.

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May 2.

*Ex parte* CAROLINE MACKENZIE.

**ON**SLOW Serjt. had on a former day obtained a rule nisi, upon the 1st and fourth sections of the statute 17 G. 3. c. 26., that the several securities given upon the grant of an annuity might be set aside, and that the warrant of attorney given to confess judgment might be delivered up to be cancelled, under the following circumstances: The grantor *Mackenzie* applied to *Roberts* to procure her some money, who referred her to *Lee*, an attorney, since deceased. The grantor being possessed of a pension of 50*l.* a-year, granted to her father, late an admiral, for his services in the navy, proposed to grant an annuity of 20*l.* secured thereon, in consideration of 120*l.*; and a lady named *Elizabeth Vaughan* was found, who had that sum to lay out. A warrant of attorney was to be given, enabling the grantee to receive 20*l.* a-year out of the grantor's pension at the Admiralty, and a warrant of attorney to confess judgment; and for further security, the grantor was required to make her will, containing a bequest for further security, and to make an affidavit that she would never revoke either her will, or the power of attorney to receive the pension; and out of the 120*l.*, the grantee, or *Lee* her attorney, was to retain 10*l.* until such affidavit should be made, and the will and affidavit were to remain in the hands of the grantee. The 120*l.* was paid down by the grantee, but *Lee* produced his bill for preparing the securities, amounting to 15*l.* 10*s.*, and out of the 120*l.* took that sum, and also 3*l.* 3*s.* for the costs of entering up judgment, which was never entered up, and also 10*s.* 6*d.* for *Young*, an attesting witness, who was present, and also kept back the 10*l.* until the affidavit should be made. *Roberts* also took out of the 120*l.* six guineas

The grantor of an annuity was required, for further security, to make her will and deposit it with the grantee, and to make an affidavit that she would not revoke it: a magistrate refused to let her swear the affidavit, but the grantee retained the will. 10*l.*, which had been retained till the grantee should make the affidavit, were then paid to the grantee. The memorial did not notice the will. Held that the memorial was therefore bad, but that the 10*l.* was not money retained within *f. 4.* of the stat. 17 G. 3. c. 26.

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as procuration-money; so that out of the 120*l.* the grantor received only 84*l.* 10*s.* 6*d.* A few days afterwards the parties went with the affidavit prepared to Mr. *Ford*, a magistrate, at *Bow-street*, in order to swear it: he strongly animadverted on the transaction, and refused to let the grantor swear it. This part of the transaction, therefore, fell to the ground, and the 10*l.* was paid over to the grantor. After this, the memorial was enrolled, but it did not notice the will, which still remained in the custody of the grantee. The annuity was many years paid, and *Onslow* now objected, 1. that the memorial ought to have noticed the will; 2. that the 10*l.* kept back by *Lee* was a part of the consideration retained on a pretence, contrary to the prohibition of the 4th section.

*Sellon* Serjt. on this day shewed cause. He contended that the proposed security by will and affidavit having been abandoned, it was unnecessary to memorialize it. In like manner, the 10*l.* retained was never intended to be retained permanently, but only till a specific purpose was answered, and that purpose having been dropped, and the sum retained having been paid over to the Defendant before the enrolment, the transaction was of so transitory and nugatory a nature, that it was unnecessary to mention it in the memorial. *Lee* too, who could have explained the transaction, was dead; and after a party has lain by for the death of the grantor's agent, the Court will not entertain an application of this sort.

*Onslow*, in support of his rule. No case has decided, that if an agent dies, therefore the grantor shall be without relief. Besides, *Young* and *Roberts* are alive, though *Lee* is dead, and they might explain the matter if it were capable of explanation. [*Mansfield C. J.* *Roberts*

*berts* is more the grantor's agent than the grantee's.] The charge of three guineas for the judgment was a colourable charge, and was extortion; for no judgment was ever entered. This retention is within the 4th section, which avoids the securities if money be retained "upon any pretence whatever." The laying the money on the table by *Mrs. Vaughan* was not a payment within the meaning of the act. *Lee's* was the hand that ultimately paid it, but the deeds and memorial state it as paid by the grantee. The grantee retained the will, which was a security, though she gave up the 10*l*.

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MANSFIELD C. J. This is a case certainly of a new sort; *Mr. Lee*, if he was alive, ought to pay all the costs, and pay to *Mrs. Vaughan*, on account of his misconduct, all the loss she has sustained in consequence of it. He requires a will, a very improper security, and the moment after *Miss Mackenzie* had given it, she might have revoked it; but as long as the will did remain, it was an additional security, and ought to have been mentioned in the memorial. *Miss Mackenzie*, although she had not made the affidavit, which *Mr. Ford* very properly refused to have sworn before him, yet might think herself bound in honour not to revoke the will: be that as it may, while it continued unrevoked, it was a part of the security. I have read the 4th section, and it seems that this sum of 10*l*. was not money retained within the meaning of that section, for it means a retaining for the benefit of the person retaining, and to the injury of the person selling an annuity. As to the sums paid to *Roberts* and *Lee*, and for the judgment, the case is nothing more than this, that *Miss Mackenzie* was, as is always agreed for, to pay for the securities, *Mrs. Vaughan* was to pay only the 120*l*. and no more. This 6*l*. 6*s*. and the 10*l*. 6*s*. were gratuitous payments paid in the way that all these sums are. We therefore



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must do only that which we are obliged to do, set aside the warrant of attorney; and as to the deeds, they are not worth a farthing. We are very sorry for it; for Mrs. *Vaughan* is innocent, she has done nothing.

HEATH J. This *10l.* was not money kept back for any purpose of the grantee of the annuity: the whole of this clause of the act must be taken together.

Rule absolute.

May 2.

HEATH and Others v. HALL and PORTER.

A creditor who has assigned his debt is a competent witness to increase the fund out of which the debt is to be paid.

An equitable assignment of a debt may be by parol as well as by deed.

The stat. 49 G. 3. c. 121. §. 14., which enacts that creditors proceeding under the commission shall be deemed to have made their election not to sue, does not extend to prevent a creditor who proves a joint debt under a commission against one partner from suing the others.

THIS was an action for money paid, lent, and had and received, brought by the Plaintiffs, who were bankers, against the Defendants, to recover the amount of money which they had supplied, and paid into the hands of the Defendant *Porter*, to be employed in his trade of a mealman, and for which they contended that both the Defendants were jointly liable, because there had been a secret partnership in the business, subsisting between *Hall* and *Porter*. The Defendant *Porter*, who had failed in trade, pleaded his bankruptcy and certificate; whereupon the Plaintiffs entered a *nolle prosequi* against him, and proceeded against the Defendant *Hall*, who pleaded the general issue. The cause was tried at *Guildhall*, at the sittings after *Michaelmas* term 1811, before *Mansfield* C. J., when it was clearly proved that money had been advanced by the Plaintiffs to *Porter*, and employed in the trade, and that *Heath* was a dormant partner. After a verdict for the Plaintiffs,

*Vaughan* Serjt., in *Hilary* term 1812, moved to set it aside, upon two grounds, which had been re-

served to him at the trial; first, upon the ground, that the Chief Justice had received the evidence of *Spriggins*, an agent of the Plaintiffs, through whose hands the money was advanced to the Defendants; and the objection to his competency was, that he was himself a creditor of the Defendants, and that the effect of the evidence he was called to give, would be to make *Hall* liable to all the debts of *Porter*, and therefore to increase the fund for the payment of his own debt. The answer given to this objection was, that the Plaintiffs had purchased of *Spriggins* the debt due to him from the Defendants, for the amount of 10*s.* in the pound, which they were to pay him, and were to stand in his rights; but no assignment by deed of the debt had ever been executed by *Spriggins* to the Plaintiffs, nor even in writing; it had only passed by parol, but the Plaintiffs had given *Spriggins* credit for that amount in the banking account which he kept with them. It was urged for the Defendants, that they did not divest the witness of his interest, for that this agreement was not binding on either of the parties. The second ground now insisted on was, that the Plaintiffs had proved their debt under the commission against *Porter*; it was therefore contended that in the affidavit they made on that occasion they must necessarily have sworn, with a knowledge of the partnership, that the debt was due to them from the Defendant *Porter* alone, and not from *Porter* and *Heath*; for they could not prove a joint debt against the effects of *Porter* only. That they must therefore be considered as having made their election to proceed under the bankruptcy for this, as a separate, and not as a joint debt, the Defendants being protected by the stat. 49 G. 3. c. 121. §. 14, and that they were estopped by their affidavit from now proving it to be otherwise. He stated that serious doubts had been entertained whether that were not the effect of this act.

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MANSFIELD C. J. observed, that as to the first point, to say that the agreement for the purchase of the debt was not binding, was begging the question. If two men agree for the sale of a debt, and one of them gives the other credit in his books for the price, that may be a very good assignment in equity: its resting in parol is no objection: even a deed could not assign it at law; and, no doubt, if there had been an assignment by deed, the assignor must sue at law, but he would notwithstanding be a good witness in this suit. Could it be said that a mere naked legal trustee for the Plaintiffs, without an interest, was not a competent witness? As to the other point, the Plaintiffs had a right to a contribution from the effects of *Hall*, although they proved their debts against *Porter*. They are entitled to prove their joint debt against *Porter's* estate, although they cannot receive a dividend till *Porter's* separate debts are fully paid. Is it meant to be insisted that any act has passed within the last six or seven years, so monstrously unjust and absurd, that where a joint debt is due from two partners, and a commission issues against one of them, the creditor cannot prove his debt under the commission, and also sue the other partner? The practice of the Court of Chancery has varied much within my memory: it used to be, that a joint creditor might, under a separate commission, prove, and receive a dividend; but now he cannot proceed to receive a dividend, unless there is a surplus, he can only prove his debt.

CHAMBER J. The interest of the witness is merely nominal.

The Court granted a rule *nisi* on the first point, but desired that it might not be spoken to, unless the Defendants' counsel could produce some authority to shake

the present opinion of the Court; and they altogether refused the rule on the second point.

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On this day *Vaughan* and *Rough* Serjts., for the Defendants, not having found any authority to serve their purpose, the Court relieved *Shepherd* Serjt. from arguing for the Plaintiffs, and

Discharged the Rule.

MERRILL and Another, Assignees of the Effects  
of BIGGS, a Bankrupt, v. FRAME.

May 2.

THE Plaintiffs declared in covenant upon a lease made by the Defendant to *Biggs*, since a bankrupt, whose assignees they were, whereby the Defendant “ demised, leased, and to farm let,” to the bankrupt, a messuage and land in the parish of *Hillingdon*, for a term of 17 years and a half, wanting 10 days, under the yearly and other rents therein expressed. The declaration then stated a covenant by the Defendant, with the bankrupt, his executors, administrators, and assigns, “ that the bankrupt, his executors, administrators, or assigns, some or one of them, paying the said rents, and performing, and keeping all the covenants, provisoes, and agreements in the said indenture contained, should and might peaceably and quietly occupy and enjoy the premises without the lawful let, suit, or eviction of the Defendant, or any claiming or to claim, by, from, or under him. The Plaintiff then assigned as a breach, an eviction by a title paramount to the title of the lessor. The Defendant demurred, and the Plaintiff joined in demurrer.

If a lease contain a covenant for quiet enjoyment against the lessor and those who claim under him, the lessee cannot, upon an eviction by a paramount title, recover under the implied covenant for general title implied in the word “ demise.”

*Rough* Serjt. was to have argued in support of the demurrer, but he was stopped by the Court, who called on

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*Shepherd* Scrjt. to support the declaration. He contended that although under the express covenants for quiet enjoyment against the lessor and all claiming under him, the Plaintiff could not recover upon an eviction by a paramount title, yet the latter covenant did not restrain or destroy the implied covenant for an absolute good title, which was contained in the words "demised and leased;" and he cited *Gainsford v. Griffith*, 1 *Saund.* 59. to shew that there might be a distinct general covenant, not restrained by the subsequent particular covenant.

The Court expressed a decided opinion against the possibility of applying that doctrine to the present case. The rule of law was, that *expressum facit tacitum cessare*. But the argument of the Plaintiff would make *expressum* and *tacitum* to mean the same thing.

Judgment for the Defendant.

May 2.

LANGHORN v. COLOGAN.

If a policy is executed in the printed form, without any specific subject of insurance being inserted in writing, and the subject-matter is afterwards added in writing, and the addition signed by some of the underwriters only, the assured cannot recover against those underwriters who do not so sign, on the contract, as it stands altered by the insertion.

THIS was an action upon a policy of insurance which was subscribed by the Defendant in the usual printed form, "upon any kind of goods and merchandises, and also upon the body, tackle, apparel, ordnance, munition, artillery, boat, and other furniture of and in the good ship —, at and from *London* to any port or ports in the *Baltic*," no words in writing, descriptive of the specific subject of insurance, having at that time been inserted in the policy. No value was declared. After the subscription by the Defendant, the Plaintiff inserted in the policy, in the blank which occurs after the printed words "shall be valued at," striking out the word "at," the words "100 hogsheads of fine sugar, 60 hogsheads of molasses, and

and 20 tuns of fustick." The policy was afterwards signed by several of the underwriters with the initial letters of their names, set against these words, to indicate their approbation of the insertion, and their consent that the assurance should be on those articles; but the Defendant had not subscribed his initials, nor was it proved that he had given any verbal assent to this addition. There were several counts in the declaration, laying the insurance in different ways. The second count stated, that with the consent of the underwriters the insurance was afterwards declared to be on the goods specified. Upon the trial of this cause at *Guildhall*, at the sittings after *Michaelmas* term 1811, before *Mansfield* C. J., it was objected, upon this instrument, that the original policy was discharged by the alteration, and that the Defendant had never subscribed or assented to the altered policy. It was also urged that this was such an alteration in the subject-matter of the insurance, as required a new stamp, as a new contract, and was not cured by the statute 35 G. 3. c. 63. s. 13. *Mansfield* C. J. nonsuited the Plaintiff, reserving to him liberty to move to enter a verdict.

*Shepherd* Serjt. accordingly in *Hilary* term obtained a rule nisi to that effect, against which

*Lens* and *Vaughan* Serjts. on this day shewed cause. They insisted, first, that the altered contract required a new stamp; secondly, that the contract, being varied without the knowledge and consent of the Defendant, was not binding on him, and that even if a parol consent had been given, it could have had no operation by way of addition to a written instrument; thirdly, that the original contract was destroyed by the alteration, so that the Plaintiff could not apply any of his counts thereto;

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and fourthly, that the risk having once attached, there could in this case be no return of premium.

*Shepherd* and *Best* Serjts. in support of their rule argued, 1. That the Defendant, by subscribing the policy in blank, gave a virtual permission and authority to the Plaintiff afterwards to insert the specific subject of insurance, and to declare the interest and value. It is a common practice to execute policies with permission expressed, that the assureds may by a subsequent indorsement on the policy declare the subject-matter and interest; the only difference is, that here the permission is implied. 2. If that be not so, the contract is not altered *quoad* this Defendant, who did not put his initials to the alteration, but remains, as to him, the same as it was originally framed; for the same paper, with one single stamp, may contain one contract as between the assured and one underwriter, and another contract as between the assured and another underwriter: one may legally execute the policy for the goods only, another for the ship only, another for the freight alone, yet the same instrument shall be valid for all; this being so, the policy, as subscribed by the Defendant, is a policy both on goods and ship, and attaches on such of the several subject-matters therein mentioned, in which the Plaintiff is proved to be interested. It is an ordinary practice to subscribe policies, leaving the specification of goods and value to be filled up afterwards, in like manner as a bill of exchange may be drawn, or accepted, with a blank for the sum, payee, or time of payment, which, being afterwards filled up, completes the instrument. As to those underwriters who have put their initials, this is a policy on the specified articles, being, so far as relates to them, restricted by their signature; and as to the others, it is an insurance on the matters enumerated in the blank form. If that be not so, then it is only an inchoate instrument,

strument, which never was completed, and therefore no risk ever attached, and the Plaintiff is entitled to recover as for a return of premium. So, if the contract was altered by the assured without the consent of the underwriter, in that case also, there must be a return of premium. The objection raised from the want of a new stamp, if at all applicable, would apply only to the case of those underwriters who signed their initials to the altered policy, not to this Defendant, against whom the Plaintiff stands on the policy as it was originally framed, stamped, and subscribed. An intention to alter a policy, which intention is never carried into effect, cannot render a new stamp necessary.

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MANSFIELD C. J. In this case, as to the main point, I cannot get rid of the impression I had at the trial, that the instrument now is different from what it is stated in the only count on which the Plaintiff could have recovered at the trial. The alteration is a very material one. When once a declaration of interest is made, the policy attaches not on any goods the Plaintiff might put on board, but on those comprehended in that declaration. The instrument, therefore, as to those who do not assent to that declaration, is gone. As to a return of premium, suppose the assured tears the seal off his policy, can he by his own act compel the assured to return the premium? The underwriter has fulfilled all his part: the assured can no more compel the underwriter to return the premium, than the underwriter can compel him to relinquish the contract. As to the case, to which this is compared, of effecting an assurance and not putting any goods on board, it is understood to be an implied term of the contract of insurance, that if the goods are not put on board, the money shall be returned; here the law avoids the contract, by an accident, unforeseen, and unintended, but the premium cannot be returned. And  
 it



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it rests with the conscience of the Defendant whether he will pay this money or not. The law upon the subject is plain.

HEATH J. was of the same opinion.

CHAMBRE J. concurring,

The rule was discharged.

May 2.

WILDE v. FORT and Others, Assignees of BRICK-  
 wood, a Bankrupt.

If the vendor of an estate by auction does not shew a clear title by the day specified, the purchaser may recover back his deposit and rescind the contract, without waiting to see whether the vendor may ultimately be able to establish a good title or not.

THIS was an action of *assumpsit*. The declaration stated that the Defendants, as assignees of the bankrupt, on the 26th of October 1810, caused to be put up to sale, amongst other things, a certain freehold ground-rent arising from six dwelling-houses in *Gamberwell Grove*, in the county of *Surry*, the purchaser or his successors to be entitled to the improved value at the expiration of the lease, upon and subject to the following, (amongst other) conditions; that is to say, That the highest bidder should be the purchaser, and should pay

A purchaser is not bound to accept a doubtful title.

Where it was an objection to a title that it was doubtful whether the wife of a party to a deed thirty years old was barred by that deed of her dower, it was not answered by proving at the trial that she was then dead, such proof not having been before given.

It is a sufficient objection to a title, that a person under whom the vendors claim, held, during his seisin of the estate, a newly created office under the crown, (that of commissioner of *Dutch property*;) in which he was directed by statute, to pay the surplus (after certain charges answered) of the proceeds of certain sales into the Bank of *England*, there to remain subject to such orders as the king in council should give thereon, and that his accounts with the crown were yet unliquidated.

The lands of every person who has received money belonging to the crown, or for which he is an accountant to the crown, are liable to an extent under the stat. 13 *Elix.* c. 4. *Per Mansfield C. J.*

And at common law also. *Per Heath J.*

down

down immediately a deposit of 20*l.* *per cent.* in part of the purchase-money, and sign an agreement for payment of the remainder on or before the 30th of *November* then next, and that the purchaser should be entitled to the rents and profits from *Michaelmas* 1810; that full and proper abstracts would be given at the vendor's expence, but the deeds of conveyance and any attested copies that might be required were to be at the purchaser's expence. The Plaintiff averred that on such sale he became the purchaser of the said ground-rent and premises upon and according to the said condition for the sum of 910*l.* and paid down immediately a deposit of 20*l.* *per cent.* in part of the purchase-money, and signed an agreement for payment of the remainder thereof on or before the 30th of *November* then next, according to the conditions. He then averred mutual promises and his own willingness to perform, and his request to the Defendants to give him a full and proper abstract of a good and valid title to the premises according to the form and effect, true intent, and meaning of the conditions, but that the Defendants did not nor would, when they were, so requested, or at any time before or since, give nor would give to the Plaintiff a full and proper abstract of a good and valid title to the premises; neither had the Defendants returned or paid to the Plaintiff the deposit money, although requested; by means whereof the Plaintiff had been deprived of all benefits and advantages which would have arisen to him from the completion of the purchase, and had been put to great expences, amounting in the whole to 50*l.*, in endeavouring to procure such title, and to get the purchase completed, and had lost all gains and profits which he might and otherwise would have made and acquired, from using and employing the money paid by him as deposit, and other monies provided and kept by the Plaintiff for the completion of the purchase. The second count stated, that in consideration that the Plaintiff

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tiff had bargained with the Defendants, as such assignees, for the purchase of a ground-rent arising from six dwelling-houses, and of the improved value of the same at the expiration of a certain lease thereof, at and for the sum of 910*l.*, and had paid to the Defendants 182*l.* in part of the purchase-money, and had also agreed to pay the residue thereof on or before the 30th day of *November* then next, and to accept a proper conveyance of that ground-rent and premises, on having a good and valid title made to him to the same, (the deeds and copies to be at his expence,) the Defendants undertook that they would make to the Plaintiff a good and valid title to that ground-rent and premises; and that although the Plaintiff was ready to pay the remainder of the purchase-money, and to accept a proper conveyance of those premises according to his agreement, yet that the Defendants did not nor would, although requested, make a good and valid title to the Plaintiff of the same premises, but had thitherto wholly failed and made default, neither had they returned to the Plaintiff that sum of 182*l.*, or any part thereof, although requested; by reason whereof the Plaintiff had been deprived of all the benefits and advantages which would have arisen to him from the completion of that purchase, and had been put to great expences, amounting to 50*l.*, in endeavouring to procure such title, and to get the purchase completed, and had lost all gains and profits which he might and otherwise would have made and acquired from using and employing the money so paid by him as deposit, and other monies provided and kept by the Plaintiff for the completion of that purchase. There were also counts for money paid, money had and received, and upon an account stated. The Defendant pleaded the general issue.

Upon the trial of this cause at the *London* sittings after *Michaelmas* term 1811, before *Mansfield* C. J. and a special

a special jury, the Plaintiff proved the sale upon the conditions stated, and the payment of the deposit as averred in the declaration, and that after an abstract, which was read at the trial, had been delivered, and much correspondence had passed between the Plaintiff and the solicitors for the Defendants respecting it, the objections to the title not being removed or answered, the Plaintiff about a year after the time fixed for the completion of the purchase, commenced this action, and delivered under a judge's order a bill of particulars, stating the objections to the title made on the behalf of the Plaintiff, of which the two most material were as follow. 3d, That it did not appear that the widow of *Simon Halliday*, one of the grantors in a deed of 8th July 1787, (who was living in 1807), was dead, and that the limitations in the deed 1st May 1783 for *S. Halliday's* benefit did not appear sufficient to bar dower. By that deed the premises were granted and released to *Edmund Halliday* and his heirs, to hold to him and his heirs to the use of such persons, and to and for such estates, as *Simon Halliday* should by deed or will direct, limit, or appoint, and in default of such appointment, to the use of *Simon Halliday*, his heirs and assigns for ever. 6th, That Mr. *Brickwood* appeared by the abstract to be an accountant and debtor to the crown, and that the property purchased might consequently become, or actually was, liable to an extent, Mr. *Brickwood*, to whom it belonged, being a *Dutch* commissioner, under the statute 35 G. 3. c. 80. and his accounts being as yet unsettled. With respect to the last objection, the facts were, that the stat. 35 Geo. 3. c. 80. f. 21. after reciting that several ships and vessels belonging to the subjects of the *United Provinces*, and also other ships and vessels having on board goods and effects belonging to such subjects, had been, or might be thereafter detained in, or brought into the ports of this kingdom, and that such cargoes and such ships and vessels might

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might perish, or be greatly injured, if some provision was not made respecting the same, it was enacted, that it should be lawful for his majesty in council to grant a commission, under the great seal, to three or more persons, authorizing them to take such ships and cargoes into their possession, and under their care, and to manage, sell, or otherwise dispose of the same to the best advantage, according to such instructions as they should from time to time receive from his majesty in council, subject nevertheless, in respect of goods, thereby directed to be brought into the warehouses of the *East India* Company, to the special provisions in that act contained. And after certain other provisions, it was by the 26th section enacted, that if any of the said ships, goods, or effects should be sold under that authority, they should be respectively liable to the duties, and entitled to the drawbacks, and subject to the conditions, rules, regulations, and restrictions, penalties, and forfeitures therein before mentioned; and the commissioners should, and were thereby authorized and required to cause the duties and the expences of the sale, in the first place, to be paid out of the proceeds of such sale; and after such payment, should, (except in cases where it is otherwise provided by that act,) cause the proceeds of such sale to be paid into the Bank of *England*, there to remain, subject to such orders as his majesty in council might from time to time think fit to give thereupon; or in case such proceeds should arise from a sale made under the directions of the High Court of Admiralty, as therein-before provided, then subject to such orders as that court should make concerning the same. A commission under the great seal, dated the 19th June 1795, after referring to the provisions of that statute, and after reciting that several such ships as therein mentioned, had been, or might be thereafter detained in, or brought into the ports of this kingdom, appointed Mr. *Brickwood* and two others

to

to take all such ships, cargoes, &c. into their possession, and under their care, as the crown was empowered to seize under that act, and to manage, sell, and dispose of the same to the best advantage, according to such instructions as they should from time to time receive from his majesty in council, and to dispose of the proceeds, and to do every thing which the crown could authorize them to do by virtue of that act. In *May* 1809 his majesty by an order in council directed the commissioners to make up their accounts, and therein to take credit for a commission of *5 per cent.* upon the nett proceeds of the ships and other effects which had come into their hands, as a remuneration for their services, and in full discharge of all expences whatever which they might have incurred in the course of their commission; and it appearing that the commissioners had made a considerable sum by investing from time to time large sums in floating securities bearing interest, the commissioners were by the same order in council directed to give credit for all sums or profit made by them from time to time upon the balances in their hands. Subsequently to this order the commissioners delivered in their accounts to the treasury, in the manner prescribed for public accountants, which accounts were at the time of the trial before the board of auditors, but they had not complied with the order in council, as to the mode in which their accounts should be made out, having omitted to charge themselves with the interest upon the balances, and having claimed and charged a commission of *5 per cent.* upon the gross, instead of the nett proceeds of the *Dutch* property, alleging that after letters of reprisal were issued against the *Dutch* provinces, they were no longer to be considered as commissioners under the act of parliament, but as acting as prize agents for his majesty, and therefore entitled to claim the allowance, which up to the 45th *Geo.* 3. was received by prize agents, viz. *5 per cent.* upon the gross proceeds.

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proceeds. The account thus delivered in shewed a balance to be due from the commissioners to his majesty, which was thus stated: "1810. *March 31.*—To balance, invested in exchequer bills, 28,935*l.* 8*s.* 6*d.*" They had however, in their ledger, stated an account, shewing the amount of interest made by them upon the balances, and the difference between the 5 *per cent.* upon the nett and the gross proceeds, and if they had stated their accounts in the manner prescribed, the balance due from them to government would be very considerable, the amount of the interest made on the balances, being, as they themselves stated, upwards of £42,000

And the difference between the commission on the nett, and the gross proceeds, being upwards of - - 27,100  
To which add the balance as they stated it, 28,900,

There was a deficit upon the face of their accounts of at least - - £98,000;

And that balance could only be reduced by their succeeding in obtaining from his majesty a larger allowance than that granted to them by the order in council, and by their being entitled, (as they claimed to be,) to put the interest upon the balances into their own pockets, with a view to which, they had shortly before the trial filed a bill in the Court of Exchequer against his majesty's attorney-general for relief. And the accounts themselves were at the time of the trial only partly audited, so that it was possible that many items in their accounts might eventually be disallowed by the board of auditors, which might increase the balance against them. The commissioners had lodged 35,000*l.* in the hands of government, which they conceived would cover all demands. It was probable that several months would elapse after the time of the trial before their accounts would be finally settled. It was in evidence that before the

the trial no proof had been given of the death of the widow of *Simon Halliday*; but at the trial it was proved by the Defendants that she died in 1807. The case of *Cox v. Chamberlain*, 4 *Ves.* 637. was cited, to shew that the limitations in the deed of 1st May 1783 were not such as would bar the wife of *Simon Halliday* of her dower. Several letters of the Plaintiff's were insisted on by the Defendants to shew that there had been a waiver of these objections; but the jury, to whom *Mansfield C. J.*, contrary to his subsequent opinion, left that question upon the construction of the letters, expressly found that there had been no waiver, and under the direction of the Chief Justice, who was of opinion that the Plaintiff was neither entitled to recover back the expences of investigating his title nor interest on the deposit, even if the Defendants had made interest of it, found a verdict for the Plaintiffs for 182*l.*, being the amount of the deposit, without either expences or interest, but subject to the two objections which the Chief Justice reserved, of the liability to an extent and to dower.

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*Lens Serjt.* had in *Hilary* term 1812 obtained, on behalf of the Defendants, a rule *nisi* to set aside this verdict and have a new trial; against which

*Shepherd* and *Best Serjts.* now shewed cause. At law, if the Defendant would resist the Plaintiff's claim to rescind the contract, it is necessary that the Defendant should shew that he had a good title to convey at the time stipulated for in the agreement of purchase: a court of equity is at liberty to take notice of facts which take place after the contract, subsequently enabling the vendor to complete his title. [*Mansfield C. J.* And that power is attended with dreadful effects in the delay thereby occasioned.] It is not enough to say that a dis-



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puted point in the title has not been decided adversely to the purchaser; he is not bound to buy a law suit with his purchase. *Hartley v. Peaball, Peake. N. P. Cases, 130.* In an action respecting the purchase of the lease of a public house, the purchaser's attorney was going to examine the muniments, when the vendor's attorney assured him they contained none but usual covenants. In a mesne assignment was a covenant that the assignee and his assigns would buy his beer of a particular brewer, and this was made an objection to the title. Lord *Kenny* C. J. said he would not decide whether this covenant would be binding upon the purchaser; but he would not compel the purchaser to buy a law-suit. No evidence in this case had been produced of the death of the widow at any time before the trial. With respect to the claim of the crown on Mr. *Brickwood's* estate, it is not competent for his assignees to discuss with the Plaintiff, in this court, a point over which the Court of Exchequer entertain exclusive jurisdiction; and no person could at the time of the trial tell how that Court would decide it. But this debt of Mr. *Brickwood* to the crown, as it is not only probable, but quite certain, under the statute 13 *Eliz. c. 4.*, creates a lien on his real estate. [*Heath J.* It does at common law.] The preamble of that statute purports to be "for the better security of the queen's majesty, her heirs and successors, against such as shall have the receipt and charge of the money and treasure of her highness, her heirs and successors." This alone would suffice, for it is clear that Mr. *Brickwood* was a receiver of money as trustee for the crown. The statute enacts, that "all lands, tenements, profits, commodities, and hereditaments, which any treasurer, or receiver, in or belonging to any of the queen's majesty's courts of the exchequer, wards and liveries, or duchy of *Lancaster*, treasurer of the chamber, cofferer of the household to the queen's majesty, her heirs or successors,

treasurer

treasurer for the wars, treasurer of any fort, town, or castle where any garrison is or shall be kept, treasurer of the admiralty or navy, treasurer, under-treasurer, or other person accountable to the queen's majesty, her heirs or successors, for any office or charge, of or within the mint, treasurer or receiver of any sums of money imprest, or otherwise, for the use of the queen's majesty, her heirs and successors, or for provisions of victual, or for fortifications, buildings, or works, or for any other provisions to be used in any of the offices of the queen's majesty's ordnance and artillery, armory, wardrobe, tents and pavilions, or revels, customer, collector, farmer of customs, subsidies, imposts, or other duties within any port of the realm, collector of the tenths of the clergy, collector of any subsidy or fifteenth, receiver-general of the revenues of any county or counties, answerable in the receipt of the exchequer, or in the court of wards and liveries, or the duchy of *Lancaster*, clerk of the hanaper, then had, or at any time thereafter should have, within the time whilst he or they or any of them should remain accountable, should, for the payment and satisfaction to the queen's majesty, her heirs and successors, of his or their arrearages, at any time thereafter to be lawfully, according to the laws and customs of this realm, adjudged and determined upon his or their account, (all his due and reasonable petitions being allowed,) be liable to the payment thereof, in like manner as if bound by writing obligatory having the effect of a statute staple." These descriptions are sufficiently ample to comprehend the office of *Dutch* commissioner. It has lately been solemnly settled, that the money received by the commissioners in that capacity was a droit of admiralty, and therefore belonged to the crown and was received for the crown; and if the Court were now sitting in judgment between the crown and the commissioners, they would feel no

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difficulty in deciding in favour of the crown; or, if the sense of the statute were dubious, the rule of law is, that it must be expounded most favourably for the crown: but the Plaintiff is not driven to that argument; for it is sufficient for him, if the point be dubious: he is not bound to take a doubtful title. He does not, however, rest his right to recover on this point only: it was the duty of the vendor to clear up the various difficulties which arose upon the abstract when called upon to verify it with the deeds, many of which he never produced, and to prove it free from incumbrances: it is not sufficient for him to do this at the trial, after the action brought to recover back the deposit. If the vendors ever put themselves in a situation to complete the title, a court of equity will compel the purchaser to take it, and will then compel him to pay the whole price, including the deposit, which he ought now to recover back; but to entitle him to receive back this sum in the mean time, it is sufficient that he had a good cause of action vested at the time of suing out his writ. So held by Lord Ellenborough C. J., *Seaward v. Willock*, 5 *East*, 208.

*Lens, contra.* There were no solid objections to this title, and therefore the money ought to remain where it is, until the Chancellor shall have disposed of such as are suggested. The statute of *Elizabeth* recounts a great number of offices, specifically described, none of which are applicable; and although it has the words, receiver of any sums of money, in any or otherwise, that means received on other like occasion in the administration of the revenue, as is there mentioned, but is not applicable to the office of the *Dutch* commissioners. The money they received never was the money of the crown; and as the commissioner's only duty was to receive the money and pay it into the Bank, he never

was an accountant to the crown, nor a receiver of the crown. With respect to the point raised concerning the dower, the authority cited of *Cox v. Chamberlain*, was favourable to the Defendant, and shewed that the widow had no title to dower: at the utmost, the Master of the Rolls only doubted, he did not decide the question.

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MANSFIELD C. J. Every person who has received money belonging to the crown, every accountant of the crown for money of the crown received, as I have always understood, falls within this act; for, after mentioning a great many officers of the crown, it has the words receiver of any money imprest or otherwise: at all events the purchaser of this estate is not bound to try that question. And as to the other question, though it was rather a trifling objection, I do not know but what the Plaintiff had a right to make it. For though the title of the doweress accrued thirty years since, yet it was not clear that it had ceased, and in fact she did not die till 1807. I do not know how you can get rid of that objection at law. I was very indulgent to the Defendants, in putting the question of waver to the jury.

HEATH J. was of opinion that the office within the statute.

Rule discharged.

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## (IN THE EXCHEQUER-CHAMBER.)

May 9.

GWYN v. GODBY.

Interest is not allowed upon the affirmance of a judgment merely for money lent.

But interest is allowed upon the affirmance of a judgment for the balance of an account for money lent and for interest upon the advances, where the Plaintiffs, as bankers, have been in the habit of charging it.

**RICHARDSON** had on a former day moved for interest upon the affirmance of this judgment, which he then simply stated to have been obtained on an action for money lent, when the Court upon that statement refused his application; but on this day he stated that the money was lent by the Plaintiffs as bankers to the Defendants, in their course of dealing with the Defendant; and it was sworn that they were in the habit of charging him with interest upon every advance of money, and that interest was included in the sum for which the verdict had passed.

The Court now allowed the application.

Rule absolute.

May 9.

HORWOOD and Another, Executors of COARE,  
v. UNDERHILL.

If the grantor of an annuity secures it by a bond, whereby he binds himself, his heirs, &c., it is not necessary that the memorial of the bond should describe it as binding his heirs.

**THIS** was a writ of error brought to reverse a judgment of the Court of King's Bench, given for the Defendant. 10 East, 123. The Plaintiff below declared as executor in debt on a bond, made to the testator for 2800*l.*, which bond and the condition were set out upon oyer, whereby it appeared that the Defendant and others *jointly and*

*Semble* that nothing more is necessary to make good the memorial of an annuity than a compliance with those requisites which are prescribed in terms by the statute 17 G. 3. c. 26. s. 1.

*severally*

*severally* bound themselves, and their, and each of their “*heirs, executors, and administrators,*” in the penal sum of 2800*l.*, conditioned to secure to the testator an annuity of 155*l.* 11*s.* 1*d.* during the life of the longest liver of the obligors, in consideration of 1400*l.* to them paid: and then the Defendant pleaded, amongst other pleas, 2*dly*, that no memorial of the bond was inrolled in Chancery, pursuant to the stat. 17 *Geo.* 3. c. 26. 3*dly*, That a memorial of the bond was inrolled by the testator on the 7*th* of *January* 1797, within 20 days of the execution, which memorial was set out in the plea, wherein it is only stated that the *obligors became bound*, without saying jointly and severally, to the testator in 2800*l.*, conditioned for payment by them, or any of them, their or any of their heirs, executors, or administrators to the testator, of the annuity, &c. and without stating that they bound their and each of their *heirs, executors, and administrators*: and that no other memorial of the bond was inrolled. The same question was raised by the 15*th* plea, which stated that the Defendant ought not to be charged, &c., because for better securing the annuity in the condition of the bond in suit mentioned, *P. Giblett*, by his bond of the same date, became bound to the testator in 2800*l.*, for which he bound himself, “his *heirs, executors, and administrators*,” and that the testator caused a memorial of that bond to be inrolled; which does not state that *P. G.* thereby bound his heirs, executors, or administrators.” The replication to the second plea alleged that a memorial of the bond, to wit, the memorial set forth by the Defendant in the third plea, was inrolled in time, pursuant to the statute: and demurred generally to the third and fifteenth pleas. And the Defendant joined in those demurrers, and by his rejoinder demurred generally to the replication to the second plea. The Plaintiff by his rebutter, joined in the last demurrer.

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This case was argued in *Michaelmas* term 1811 by *Holroyd* for the Plaintiff in error, who stated that the objection made, that the memorial did not describe the bond as a joint and several bond, was now abandoned, as it had before been in the court below; so that the only point was, whether the annuity was avoided by the omission in the memorial to describe the bond, as a bond that bound the heirs of the obligors. The foundation of the objection is, that if any one security for the annuity is not sufficiently memorialized, the defect avoids the whole. The second plea and the replication to it, must, so far as this objection bears upon them, be taken distinctly from the rest of the record; and inasmuch as it does not appear upon the face of the second plea that *Paul Giblett* did bind his heirs, it forms no objection upon that plea that the memorial therein referred to does not describe *Giblett's* bond as a bond binding his heirs. Therefore the objection arises only on the third and fifteenth pleas. The statute, though it is to be construed literally so far as it is remedial against fraud, ought, like the statutes of *Elizabeth* made against fraud, to be construed strictly, so far as it is a penal statute, and in avoiding the securities it operates penally. But the argument goes now to avoid the deed for the want of that which the statute does not require. The act demands that the " memorial shall contain the day of the month and the year when the bond bears date, and the name of all the parties, and for whom any of them are trustees, and of all the witnesses, and shall set forth the annual sum or sums to be paid, and the name of the person or persons for whose life or lives the annuity is granted, and the consideration or considerations of granting the same." The act therefore does not stop after requiring a memorial to be enrolled, but proceeds minutely to designate every essential part which the memorial ought to contain. When a bond is spoken of, it is  
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universally understood as an instrument binding the heirs : and the like in covenant : it was therefore unnecessary that the memorial in speaking of a bond, should specify any thing respecting the obligation on the heirs, because that is implied in the term bond. In *Mouys v. Leake*, 8 T. R. 411. Lord Kenyon C. J. held, that it was not necessary to insert in the memorial all the covenants in a deed, unless they modify the grant itself, as a covenant for the redemption of the annuity : that was not required under the register acts for *Middlesex* and *Yorkshire*. And he held that that which was void by the stat. 13 Eliz. c. 20. (since repealed by 43 Geo. 3. c. 84. s. 10.) as a charge upon a benefice, might be good as a personal covenant. If this objection be valid, the omission by a purchaser of lands in *Yorkshire* or *Middlesex* to describe on the register a warranty as extending to his heirs as well as to his own person, would let in all subsequent incumbrances. *Co. Dig. Annuity*, C. 2. Many cases are enumerated, in which it is held that the grantee of an annuity may make his election whether he will claim it as a rent-charge, or as an annuity ; but that having elected it as an annuity to charge the person, he cannot afterwards set it up as a rent-charge. Yet it was held in *Mouys v. Leake*, that although the benefice was never charged, but the person only, it was not necessary to memorialize the personal covenant, upon which alone the validity of the annuity hung. And as the statute does not require the memorial to state the covenants of the deed, as was there held, so neither does it require it to state upon what class of representatives of the obligor the bond is made binding : the statute does not require the heir to be named as party ; for there is no such party to the deed as the heir of a living person. The Court below were inclined to this view of the subject, and said, that if it had been *res integra*, they would have so held ; but thought themselves bound by their own former decisions :

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decisions: those, however, are not obligatory on a court of error, which will review the principle; and as they have done in the case of actions, which at one period were entertained, for legacies, thereby ousting the courts of equity of their most useful jurisdiction, but are now held not to be maintainable; and as they have done in the case of actions against femes covert having a separate maintenance, which were long supported and are now deservedly exploded, and as they have done in the case of cross remainders, which, it was long supposed, could not arise by implication between three or more, the contrary whereof they have now clearly established, so will they in this case, bring back the law to what it ought to be.

*Knox, contra.* Where heirs are bound, heirs become a party, and are therefore required by the statute to be named in the memorial. [*Mansfield C. J.* It is a strange thing if the heir can become a party, living the ancestor, during whose life it cannot be known who the heir is.] The omission to name the heir, even if the instrument be considered without regard to the parties, and only as it is binding on the property, is an omission to state the degree of obligation on the property. It is not a sufficient setting forth of the security, nor is it a true and full account of it. *Willey v. Cawthorne*, 1 *East*, 398., it was held necessary to state a joint and several bond to be such, and not sufficient to state it merely as a several bond. In the cases of *Denn v. Dupuis*, 11 *East*, 134., the Court of King's Bench, and in that of *Purling v. Parkhurst*, *ante* 2. 237. the Court of Common Pleas held that the omission to notice in the memorial the obligation on the heirs, was fatal. As to the arguments *ab inconvenienti* which have been pressed on the court, the act will have the most remedial construction by construing it most favourably to the grantor.

*Holroyd* in reply. The executors of the grantee and the heirs of the grantor become parties after the respective decease of the obligee and obligor, but are not parties during their lives, and therefore need not to be noticed in the memorial; and the one and the other only become parties as representatives, and in respect of the property: for if the property does not devolve to them they are not liable, nor parties. *Willey v. Cawthorne* was decided upon the ground that the bond was there not insufficiently; but falsely described; for, as *Le Blanc J.* remarks, *expressio unius est exclusio alterius*, and it must be taken to be only a several, and not a joint bond. The same argument does not apply here; because himself and his heirs are not correlatives. If the memorial had expressed that the obligor bound himself, his executors and administrators, the inference might arise that he had not bound his heirs; but it is no more to be inferred here that he did not bind his heirs, than it is, that he did not bind his executors and administrators. The Court decided *Denn v. Dupuis* in conformity to their decision in this very case. It is said to have been argued in *Purling v. Parkhurst*, that the circumstance of accepting the grant of an annuity binding or not binding upon the heirs, varied the consideration of the contract, of which it formed a part, and that it ought therefore to be stated as such; but the money paid is the only consideration for the grant: this judgment therefore ought to be reversed.

*Cur. adv. vult.*

On this day **MANSFIELD C. J.** delivered the judgment of the Court.

This is a question whether the securities given to secure an annuity, one of which is the bond which was the subject of this action, are void for a defect in the memorial. The supposed defect in the memorial is,  
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that in the bond given, the heir is bound, and the bond memorialized does not mention the heir: a bond binding the heir makes the property of the ancestor in his hands liable: but a bond not so mentioning the heir does not. The Court of King's Bench decided on this ground against the validity of the memorial. We have considered this question with all the respect we could to their judgment, and with all possible deliberation, and we think their judgment erroneous. Whether it is erroneous or not depends upon a very late statute, 17 G. 3. c. 26. The preamble recites that the pernicious practice of raising money by the sale of life-annuities had then of late years greatly increased, and was much promoted by the secrecy with which such transactions were conducted. So the whole evil intended to be remedied by the act, is the secrecy with which such transactions were conducted; and this evil, it was thought, would be sufficiently avoided by registering a full history of the whole transaction. The statute then goes on to enact, that a memorial of every deed, bond, or instrument, or other assurance whereby any annuity or rent-charge shall after the passing of that act be granted for one or more life or lives, or for any term of years or greater estate determinable on one or more life or lives, shall within 20 days of the execution of such deed, bond, instrument, or other assurance be enrolled in the High Court of Chancery: this enactment, then, requires that a memorial shall be enrolled, and it proceeds to direct what the memorial shall contain; namely, the day of the month and the year when the deed, bond, instrument, or other assurance bears date, and the name of all the parties, and for whom any of them are trustees, and of all the witnesses, and that it shall set forth the annual sum or sums to be paid, and the name of the person or persons for whose life or lives the annuity is granted, and the consideration or considerations of granting the same, otherwise every such deed,

deed, bond, instrument, or other assurance shall be null and void to all intents and purposes. I have read therefore, all that this statute requires, all that the memorial is to contain, and the consequence of not complying with this act of parliament in enrolling a proper memorial is extremely penal; for the non-compliance renders all the securities bad. It requires a great many particulars, but there is no mention therein of the covenants or conditions; and there certainly is none of them which requires that the memorial shall state the extent to which the instrument is binding; and it does not appear that the degree of minuteness, for want of which the judgment below is given, would at all further tend to that publicity which is the object of the statute; or that without it the publicity would not be sufficient. In giving judgment in the Court of King's Bench in this case Lord *Ellenborough* C. J. adverts to a circumstance which struck me, although it is one which we are not at all called on to decide; but I mention it. He says, "The act requires that a memorial of every bond shall be enrolled. What then will satisfy those words? Unless the words have some meaning, it would not be necessary to set forth the penalty of the bond, whether it created a charge of 100*l.* or 1000*l.*" I do not mean to pronounce that the omission to state in the memorial the penalty of the bond would not vitiate it; but I mean to express some doubt, whether, if there were a mistake of the penalty, or an omission of the penalty, it would vitiate the memorial: it is a matter of perfect indifference to the grantor, and indeed to the grantee, what is the amount of the penalty, above certain limits, whether five times or fifty times the annuity. I mention it therefore, that it may not be looked upon as a point decided. The only case at all in point is that of *Willey v. Cawthorn*, in which, by an unfortunate mistake of a clerk, the bond was described as joint, which was several, and judgment

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was given for the Defendant: Lord *Kenyon* speaks of the consideration; the consideration is merely the price paid; and Lord *Kenyon* says, "the object of the legislature was to hold the annuitant to a strict description in the memorial of the consideration of the annuity; the nature of the several instruments by which it is secured must be accurately set forth." Now the statute says no such thing. The variation there, was not, certainly, a very important one, but it was not there an omission, but a variation; for saying, "severally," may exclude the being jointly bound; and therefore it might be there said that the memorial was false. But here it is not false. If however that case had not been distinguishable from this, I do not think the Judges would be bound by so very recent a decision upon this recent statute, from attaining the true interpretation. *Denn v. Dupuis* in the King's Bench, and the former case of *Purling v. Parkhurst* in the Common Pleas, are of no weight on the present occasion: the former was decided on the authority of the case now pending, and that last was determined on a mere motion, because we would not overturn the decision of the Court of King's Bench: in that case too, the principle was abandoned by the Plaintiff's counsel, who merely endeavoured to distinguish the case from that of *Denn v. Dupuis*, without success. So the decisions all in fact rest on the authority of this case. We think therefore the ground of this doctrine is insufficient, and that the judgment must be reversed. (a)

Judgment reversed.

(a) A new and concise tabular annuities is now given by the statute 53 G. 3. c. 141. s. 2.

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## THORLEY v. LORD KERRY.

May 9.

**T**HIS was a writ of error brought to reverse a judgment of the Court of King's Bench. The Plaintiff below declared that he was a good, true, honest, just, and faithful subject of the realm, and as such had always behaved, and considered himself, and until the committing of the several grievances by the Defendant thereafter mentioned, was always reputed, esteemed, and accepted, by and amongst all his neighbours, and other good and worthy subjects of this realm, to whom he was in anywise known, to be a person of good name, fame, and credit, to wit, in the parish of *Petersham* in the county of *Surry*, and also that he had not ever been guilty, or until the time, &c. been suspected of the offences and misconduct thereafter mentioned to have been charged upon and imputed to him; or of any such offences or misconduct, by means of which premises he had before the committing of the several grievances deservedly obtained the good opinion and credit of all his neighbours, and other good and worthy subjects of this realm, to whom he was known, to wit, at *Petersham*: and also, that before and at the time of the committing of the grievances by the Defendant below as thereafter mentioned, the Plaintiff below was tenant to the Right Hon. *Archibald Lord Douglas* of a messuage and premises, with the appurtenances, situate in the parish of *Petersham*, and he being desirous and intending to become a parishioner of the same parish, and to qualify himself to attend the vestry of and for such parish, as such parishioner, agreed with *Lord Douglas* to pay the taxes of and for the said house, which he so inhabited as tenant to *Lord Douglas*, and also that before and at the time of the committing of the grievances by the Defendant below in the 1st count mentioned,

An action may be maintained for words written, for which an action could not be maintained if they were merely spoken.

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mentioned, the Defendant below was the churchwarden of and for the parish of *Petersham*, and the Plaintiff below, so being desirous and intending to attend such vestry of such parish as such parishioner, had thereupon, by his certain note in writing, given notice to the Defendant below of his agreement with Lord *Douglas*, yet the Defendant below, well knowing the premises, but greatly envying the happy state and condition of the Plaintiff below, and contriving, and wickedly and maliciously intending to injure him in his said good name, fame, and credit, and to bring him into public scandal, infamy, and disgrace with and amongst all his neighbours, and other good and worthy subjects of this kingdom, and to cause it to be suspected and believed by those neighbours and subjects, that he had been, and was guilty of the offences and misconduct thereafter mentioned to have been charged upon and imputed to him, and to vex, harass, and oppress him, at *Petersham* aforesaid, falsely, wickedly, and maliciously did compose and publish, and cause and procure to be published of and concerning him, and concerning such agreement with Lord *Douglas*, and concerning the said note in writing, a certain false, scandalous, malicious, and defamatory libel in the form of a letter to the Plaintiff below, containing, amongst other things, the false, scandalous, malicious, and defamatory and libellous matter following, (accompanied with the following amongst other innuendoes,) that is to say, “ My Lord, I conceive, as churchwarden, (meaning as churchwarden of the parish of *Petersham*,) I have nothing to say to any private agreement with Lord *Douglas* and yourself; your note (meaning the note sent to the Defendant below by the Plaintiff below,) and the manner it was conveyed to me, shews your lordship still possesses that perturbed spirit which I had hoped for your own sake, after the composition and publishing of the scurrilous address of the 26th *August*,  
 would

would have been at rest. I had before read the virulent, disrespectful, and ungentlemanlike letters to the Rev. Mr. *Marshall*: I sincerely pity the man, (meaning the Plaintiff below), that can so far forget what is due, not only to himself, but to others, who, under the cloak of religious and spiritual reform, hypocritically, and with the grossest impurity, deals out his malice, uncharitableness, and falsehoods. N. B. It was my intention never to have held or had communication with a writer of anonymous letters, (meaning that the Plaintiff below was a writer of anonymous letters,) but it appears I cannot now avoid it, (thereby meaning that the Plaintiff below had been and was guilty of hypocrisy and dishonorable conduct.) There were other counts setting out parts only of the same letter: and the Plaintiff below concluded by averring that by means of the committing of the grievances by the Defendant below, the Plaintiff below had been and was greatly injured in his good name, fame, and credit, and brought into public scandal, infamy, and disgrace, with and amongst all his neighbours and other good and worthy subjects of this realm, inasmuch that divers of those neighbours and subjects, to whom the innocence, candour, truth, integrity, reverence and respect of the religion of the Plaintiff below was unknown, had, on occasion of the committing of the said several grievances by the Defendant below, from thence hitherto suspected and believed, and still did suspect and believe the Plaintiff below to have been guilty of the offences and improper conduct imputed to him as aforesaid, and to have been, and still to be guilty of hypocrisy, malice, uncharitableness, and falsehood; and had, by reason of the committing of the several grievances by the Defendant below, from thence hitherto, and still did refuse to have any acquaintance, intercourse, or discourse with the Plaintiff below, as they were before used and accustomed to have, and otherwise would have had. And the Plaintiff below had been and was by means of the premises

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otherwise greatly injured, to wit, in the parish of *Petersham*, to his damage of 2000*l*. Upon not guilty pleaded, the cause was tried at the *Surry* spring assizes 1809, when the writing of the letter by the Defendant was proved, and that he delivered it unsealed to a servant to carry, who opened and read it: a verdict was found for the Plaintiff with 20*l*. damages, and judgment passed for the Plaintiff without argument in the court below. The Plaintiff in error assigned the general errors.

*Barnewall* for the Plaintiff, in error, in *Trinity* term 1811, argued, that there were no words in this case, for which, if spoken, the action would be maintainable, and he denied that there was any solid ground, either in authority or principle, for the distinction supposed to have prevailed in some cases, that certain words are actionable when written, which are not actionable when spoken. He contended that all actionable words were reducible to three classes: 1. where they impute a punishable crime; 2. where they impute an infectious disorder; 3. where they tend to injure a person in his office, trade, or profession, or tend to his dishonour, or produce special pecuniary damages. 1 *Ro. Ab. Action sur case pur parols passim*. Co. Dig. *Action upon the Case for Defamation. Passim*. And these words do not come within either of those classes. Neither of those books recognize the distinction between written and unwritten slander. All the older cases treat them on the same footing. *Brook v. Watson*, Cro. El. 403. "He is a false knave and keepeth a false debt-book, for he chargeth me with the receipt of a piece of velvet, which is false." The words were held not to be actionable, and no such distinction was there taken. So, *Boughton v. Bishop of Coventry and Lichfield*, *Anderson* 119. The words, "he is a vermin in the commonwealth, a false and corrupt man, an hypocrite in the church of God, a false brother amongst us," were held not actionable.

There

There is also a material distinction which has been overlooked in all the cases, between those words which, tending to irritate and vilify, are indictable, because they conduce to a breach of the peace, and those which are of themselves actionable, the latter class being by no means so extensive as the former. *Comyn*, in his *Dig. Libel. A. 3.* when he cites *Fitzgibb. 121. 253.* that it is a libel if he publishes in writing, though in words not actionable, is considering this matter wholly in a criminal point of view. The last-mentioned distinction must necessarily exist, because the ground of action is the amount of the civil injury sustained by the Plaintiff, not the immorality of the act of the Defendant. In the case of *King v. Lake*, indeed, *Hudr. 470.* which was an action for words in an answer to a petition preferred by the Plaintiff to the House of Commons against the Defendant, *Hale C. B.* held, that although general words spoken once, without writing or publishing them, would not be actionable, yet there, they being writ and published, which contains more malice than if they had been once spoken, they were actionable. And the Court being all of that opinion, judgment was given *pro querente nisi causa*, &c. But in that case, this ground was unnecessary to support the decision, for the words imputed violence, seditious language, illegal assertions, ineptitudes, imperfections, gross ignorances, absurdities, and solcisms, and were laid to be spoken to the Plaintiff's damage in his good name and credit and profession as a barrister at law. And in *2 Vent. 28.* another action was brought within five years after, between the same parties for a letter written by the same Defendant to the Counsellors of *Lincoln*, dampifying the Plaintiff in his profession of a barrister: but although *Vaughan C. J.*, contrary to *Wyld, Tyrrell*, and *Archer Js.*, held that the action lay not, the Court did not at all advert to the distinction between written and unwritten slander, in support of their judg-

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ment. The distinction was indeed noticed in *Horman v. Delany, Fitzg.* 254., but the same case is reported by *Strange*, vol. 2. 898. who was of counsel in the cause, and who puts it merely on the ground of its being spoken of the Plaintiff in his profession. In *Onslow v. Horne*, 3 *Will.* 186. it is held that even words imputing a crime, are not actionable unless the punishment be infamous. 2 *H. Bl.* 531. *Savile v. Jardine*, it was held that the word swindler when spoken was not actionable, and the distinction was there, indeed, assumed, and the case is thereupon argued to be reconcileable with *J' Anson v. Stuart*, 1 *T. R.* 748. where the same word written was held actionable; but in the latter case is an *innuendo*, that the Defendant intended an obtaining money under false pretences, which incurs an infamous punishment, and is therefore clearly actionable, without recurring to the support of this disputed distinction. In the precedents in *Raft.* 12, 13. *Robins. Ent.* 72. the words are not stated as a libel: it seems the distinction was unknown. In *Crop v. Tilney*, 3 *Salk.* 226. the words were certainly seditious, if not treasonable. The reason assigned, that the printing or writing indicates a greater degree of malice than mere speaking, is a bad one; for it is not the object of an action at law to punish moral turpitude, but to compensate a civil injury: the compensation must be proportionate to the measure of the damage sustained; but it cannot be said that publication of written slander is in all cases attended with a greater damage than spoken slander, for if a Defendant speaks words to an hundred persons assembled, he disseminates the slander and increases the damage an hundred-fold as much as if he only wrote it in a letter to one.

*Dampier*, in affirmance of the judgment. This action is maintainable, first, because the Plaintiff is a peer of the realm: and many things are actionable when spoken

of a peer, which are not actionable if spoken of a private person; as in the *Marquis of Dorchester's* case, *Mich. 24 Car. 2. B. R. Bull. N. P. 4.* "He is no more to be valued than that dog that lies there." So in the case of the *Earl of Peterborough v. Stanton*, *ibid.* "The *Earl of Peterborough* is of no esteem in this country; no man of reputation has any esteem for him; no man will trust him for two-pence; no man values him in the country; I value him no more than the dirt under my feet." It does not appear that either of these was an action of *scandalum magnatum*. The case of the *Earl of Peterborough v. Williams*, *Comb. 43., 2 Sho. 505.*, is indeed there said to be *scandalum magnatum*. The principle on which actions may be sustained for words is rather narrowly laid down in the argument for the Plaintiff in error, when the causes of action are said to be only crime, pecuniary damage, and infectious disease. The gift of the last is, that the imputation deprives the Plaintiff of society. But what can more deprive a man of society than this imputation of being one "who, under the cloak of religion and spiritual reform, hypocritically and with the grossest impurity deals out his malice, uncharitableness, and falsehoods?" If this is not a leprosy of the mind as much to be shunned as that of the body, the loss of society is not much to be regretted. If *Lake's* case had gone upon his loss as a barrister, there would have been no room for all the discussion that took place; and especially *Hale's* judgment, taking the distinction between speaking and writing. [*Heath J.* It appears by *Skyn. 124.* that the judgment in the case of *King v. Lake* was affirmed in error.] *Austin v. Culpepper*, *S. C. 2 Sho. 313.* The same distinction is taken in *Shower 314.*, though it is not taken in *Skynner*, where the libel imputed perjury, and was therefore clearly actionable. *1 Ford, MS. 49.* the case of *Harman v. Delany*, is reported more fully than in the printed report; and it is there

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said that it was so agreed by the Court. 2 *Ford*, 78. & 9. *Bradley v. Metbuen*: it there appears that Lord *Hardwicke* recognized the distinction, though it was not absolutely necessary to the judgment, which there passed for the Plaintiff. There is another principle upon which the action for slander is to be maintained beyond that of penalty and punishment, viz. of disgrace and discredit; and whether that be produced by writing, or by words, if it is punishable by indictment as tending to a breach of the peace, it is also the subject of a civil action, which may be brought to recover a compensation for the injury the Plaintiff sustains by being deprived of society, as for a temporal damage. 2 *Wilf.* 403., *Villars v. Monsey*. *Bathurst J.* held that writing and publishing any thing of a man that renders him ridiculous, is a libel, and actionable; and fully recognized the distinction between written and spoken slander. This case continues the chain from the time of *Hale C. B.* 1670, to the time of *Wilmott C. J.* within living memory. *Bell v. Stone*, 1 *Bos.* 33. The Court, in the absence of *Eyre C. J.*, clearly held that written words of contumely were actionable. [*Macdonald C. B.* Villain was the word there.] This brings us down to *Kaye v. Bayley (a)*, where the amount of damages made the question of importance, and it was thrice fully argued. If this series of 150 years decisions, (and it was a very learned person, *Le Blanc*, then Serjeant, who refused to argue the point in *Bell v. Stone*,) will not suffice to warrant the opinion that an action will lie in such case, there is no reliance to be placed on authority. If words imputing a dereliction of every duty of imperfect obligation cannot be made the subject of an action, the law of libel very imperfectly guards society.

(a) One of the parties in that writ of error, no judgment ever gave having died pending the was given.

*Barneswall* in reply. The Court will not be disposed to extend the principle laid down in all the books, limiting the cases in which words are actionable. In *1 Ro. Ab.*, case for slander, and *Co. Dig.*, *Action on the Case for Defamation*, the written and spoken slander are treated of under one title; and in the older entries there is no difference made in the declarations between written and unwritten slander, except using the word "spoken" instead of "written." In *Villiers v. Monsley*, the words imputed an infectious disorder. In *Harman v. Delaney* the words were spoken of the Plaintiff in his trade as a gunsmith. *De Grey C. J.*, in *Wilf.* 187., says that to impute to any man the mere defect or want of moral virtue, moral duties, or obligations, which render a man obnoxious to mankind, is not actionable. The case in *Anderfon* is in point, that the words here used are not actionable. The injury consists in the evil done to the Plaintiff in the minds of others; and if the words, when spoken, be not an injury, they cannot be when written. To hold otherwise would be to make the immorality, and not the damage, the ground of action.

*Cur. adv. vult.*

MANSFIELD C. J. on this day delivered the opinion of the Court.

This is a writ of error, brought to reverse a judgment of the Court of King's Bench, in which there was no argument. It was an action on a libel published in a letter, which the bearer of the letter happened to open. The declaration has certainly some very curious recitals. It recites that the Plaintiff was tenant to *Archibald Lord Douglas* of a messuage in *Peter sham*, that being desirous to become a parishioner and to attend the vestry, he agreed to pay the taxes of the said house; that the Plaintiff in error was churchwarden, and that the Defendant in error gave him notice of his agreement with *Lord Douglas*, and that the Plaintiff in error, intending

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to have it believed that the said earl was guilty of the offences and misconducts thereafter mentioned, (offences there are none, misconduct there may be,) wrote the letter to the said earl which is set forth in the pleadings. There is no doubt that this was a libel, for which the Plaintiff in error might have been indicted and punished; because, though the words impute no punishable crimes, they contain that sort of imputation which is calculated to vilify a man, and bring him, as the books say, into hatred, contempt, and ridicule; for all words of that description an indictment lies; and I should have thought that the peace and good name of individuals was sufficiently guarded by the terror of this criminal proceeding in such cases. The words, if merely spoken, would not be of themselves sufficient to support an action. But the question now is, whether an action will lie for these words so written, notwithstanding that such an action would not lie for them if spoken; and I am very sorry it was not discussed in the Court of King's Bench, that we might have had the opinion of all the twelve judges on the point, whether there be any distinction as to the right of action, between written and parol scandal; for myself, after having heard it extremely well argued, and especially, in this case, by Mr. *Barnewall*, I cannot, upon principle, make any difference between words written and words spoken, as to the right which arises on them of bringing an action. For the Plaintiff in error it has been truly urged, that in the old books and abridgments no distinction is taken between words written and spoken. But the distinction has been made between written and spoken slander as far back as *Charles the Second's* time, and the difference has been recognized by the Courts for at least a century back. It does not appear to me that the rights of parties to a good character are insufficiently defended by the criminal remedies which the law gives, and the law gives a very ample field for retribution by action for words

words spoken in the cases of special damage, of words spoken of a man in his trade or profession, of a man in office, of a magistrate or officer; for all these an action lies. But for mere general abuse spoken, no action lies. In the arguments both of the judges and counsel, in almost all the cases in which the question has been, whether what is contained in a writing is the subject of an action or not, it has been considered, whether the words, if spoken, would maintain an action. It is curious that they have also adverted to the question, whether it tends to produce a breach of the peace: but that is wholly irrelevant, and is no ground for recovering damages. So it has been argued that writing shews more deliberate malignity; but the same answer suffices, that the action is not maintainable upon the ground of the malignity, but for the damage sustained. So, it is argued that written scandal is more generally diffused than words spoken, and is therefore actionable; but an assertion made in a public place, as upon the Royal Exchange, concerning a merchant in *London*, may be much more extensively diffused than a few printed papers dispersed, or a private letter: it is true that a newspaper may be very generally read, but that is all casual. These are the arguments which prevail on my mind to repudiate the distinction between written and spoken scandal; but that distinction has been established by some of the greatest names known to the law, Lord *Hardwicke*, *Hale*, I believe, *Holt* C. J., and others. Lord *Hardwicke* C. J. especially has laid it down that an action for a libel may be brought on words written, when the words, if spoken, would not sustain it. *Co. Dig.* tit. Libel, referring to the case in *Fitzg.* 122. 253., says, there is a distinction between written and spoken scandal, by his putting it down there as he does, as being the law, without making any query or doubt upon it, we are led to suppose that he was of the

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the same opinion. I do not now recapitulate the cases, but we cannot, in opposition to them, venture to lay down at this day, that no action can be maintained for any words written, for which an action could not be maintained if they were spoken: upon these grounds we think the judgment of the Court of King's Bench must be affirmed. The purpose of this action is to recover a compensation for some damage supposed to be sustained by the Plaintiff by reason of the libel. The tendency of the libel to provoke a breach of the peace, or the degree of malignity which actuates the writer, has nothing to do with the question. If the matter were for the first time to be decided at this day, I should have no hesitation in saying, that no action could be maintained for written scandal which could not be maintained for the words if they had been spoken.

Judgment affirmed.

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HOME, Demandant; —, Tenant; ROSSITER,  
Vouchee.

Recovery amended by increasing the number of 17 messuages, which had originally been all, to 43, into which number they had been subdivided.

**L**ENS Serjt. was permitted to amend a recovery which had been suffered of an estate by the description of 17 messuages, by increasing the number to 43 messuages, upon an affidavit that the whole estate passed by the description in the deed to lead the uses, and that the number of houses, which was only 17 at the time when the last preceding recovery was suffered, had been since increased to 43 by subdividing the same.

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THIS was an action upon a policy of insurance at and from *Jersey* to a port or ports in *Norway*, there in port, and back to *London*, with or without simulated papers or clearances, to pay on notification of capture, seizure, or detention, without waiting official documents, upon the ship *Nooyfhill*, valued at 6000*l.*, beginning the adventure at and from *Jersey*, subscribed by the Defendant for 200*l.* The first count of the declaration averred, that during the voyage, the ship, by force of the winds and waves, and by the perils of the sea, was damaged to the amount of 373*l.* 13*s.* 10*d.*, and that thereupon the assured, their factors, servants, and assigns, did sue, labour, and travail for, in, and about the defence, safeguard, and recovery of the ship, and thereby incurred great charges and expences, to wit, to the amount of 373*l.* 13*s.* 10*d.*; and averred that the proportion contributable by the Defendant, according to the rate and quantity of his sum by the policy insured, amounted to 12*l.* 9*s.*; and that afterwards the vessel sailed from *Jersey* on the voyage insured, and during the voyage was forcibly captured by persons unknown, and wholly lost, by reason whereof the Defendant became liable to pay the Plaintiff 212*l.* 9*s.* according to the effect of his policy. The second count proceeded on the total loss only.

A licence to import direct from any port in *Norway*, or to sail in ballast from any port *North* of the *Scheldt* to any port in *Norway*, and in either case to import from thence, authorizes by the first clause, a sailing from a *British* port, whether *North* or *South* of the *Scheldt*, to *Norway*, to fetch the cargo.

The liability of the underwriter is not restricted to the single amount of his subscription, but he may be subject either to several average losses, or to an average loss and total loss, or to money expended and labour bestowed about the defence, safeguard, and reco-

very of the ship, to a much greater amount than the subscription; and it shall be recoverable as an average loss.

A register is not a document required by the law of nations as expressive of a ship's national character.

If the Defendant on a policy would impugn the Plaintiff's right to recover for a loss by capture, on the ground that the condemnation appears by the sentence of a foreign court to have proceeded on the want of certain documents, not required by the law of nations, which the Plaintiff ought to have provided, it is for the Defendant to shew by evidence, the foreign law or treaty which renders such documents necessary.

There

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There were also counts for money lent, money paid, money had and received, and upon an account stated. The Defendants paid into court 12*l.* 9*s.*, being 6*l.* 4*s.* 6*d.* *per cent.* upon the first count. Upon the trial of this cause at Guildhall, at the sittings after *Michaelmas* term 1811, before *Mansfield C. J.*, it appeared that the Plaintiff, who was owner of the ship which had been prize to a *British* captor, chartered her to Messrs. *Neck* and Co. of *London* for the voyage from *Jersey* to *Christiana* in *Norway*, a place belonging to *Denmark*, then at war with *Great Britain*, and thence with a cargo of deals for *London*, for concealment, describing her in the charter-party as a *Pappenburgh* vessel. Neither warranty nor representation of her national or neutral character was made to the underwriters at the time of effecting the insurance: the vessel was injured by a gale of wind while lying in the port of *Jersey* previous to her voyage, and sustained the average loss declared for and admitted, which was repaired by the Plaintiff. The Plaintiffs had procured a licence signed by a secretary of state, to be granted to *Sewell* and *Neck*, of *London*, merchants, on behalf of themselves and other *British* or neutral merchants, and thereby permitting a vessel, bearing any flag, except the *French*, to import direct from any port in *Norway*, *Sweden*, or *Denmark* without the *Baltic*, not under blockade, or to sail in ballast from any port *North* of the *Scheldt* to any port of *Norway*, *Sweden*, or *Denmark* without the *Baltic*, not under blockade, and in either case to import from thence a cargo of such goods as are permitted by law to be imported, (except spirits, stock fish, and fish oil,) to any port of the united kingdom, notwithstanding all the documents might represent her to be destined to a neutral or hostile port, and to whomsoever the property might appear to belong. The ship failed on the voyage insured, in ballast, under *Pappenburgh* colours, and before she arrived at *Christiana* was captured by

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by a *Danish* privateer, and libelled in the admiralty court at *Christiansand*, the proceedings wherein stated that the vessel had the following documents : 1. a sea-pass, dated *Meppin* : 2. a bill of sale of the ship, dated *Pappenburgh* : 3. a certificate dated *Pappenburgh* : 4. a certificate of burgherhip of the same place for the captain : 5. a list of the crew, dated *Pappenburgh*. 6. Two *Spanish* documents, and the logbook of the vessel, consisting of loose sheets of paper : that the captor alleged that there was wanting among them both a register, and a bill of admeasurement, and that the logbook was not in due order, and that the captain of the vessel pretended to be coming from *Teneriffe*, at which place he said he had unloaded a cargo of oats and cheese from *Pappenburgh*, and was now bound to *Christiana* for a cargo of wood, which voyages of the vessel and other circumstances the captor found very suspicious, and therefore considered himself entitled to detain the vessel. In those proceedings the master of the vessel affirmed the vessel to belong to a *Pappenburgher*, that she was built in the *North of Holland*, had been carried as prize into *Jersey*, and condemned; where she was sold, repurchased for a *Dutch* account, and had lately been sold to her present alleged owner, and that he had, after discharging the cargo of oats and cheese, come from *Teneriffe* in ballast. Some of the crew, however, and after them the master, confessed the true facts of the voyage. The act of the court stated, that " the Court, upon examination of the documents above enumerated, and upon minute consideration thereof, as well as of all the circumstances of the case, pronounced the following sentence. This present cause concerns the ship called *Nooybill*, sailing in ballast, which has been detained and carried into *Christiansand* by the royal cutter No. 11.; and although at first it has been stated by the captain, as well as two men of his crew, that the vessel was coming from *Teneriffe*, whither she had brought a cargo from *Pappen-*

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*Pappenburyb*, and that she was now bound to *Christiana* in order to take in there a cargo of wood ; and although this agrees with the exhibited certificate of clearance and bill of health in the *Spanish* language, dated the 15th of *May* 1810, it has been manifested since, by the unanimous declaration of the crew, and finally also by the confession of the captain himself, that the vessel was coming from *Jersey*, and that the two *Spanish* documents mentioned above, as well as the list of the crew, were forged. The captain having thus made use of a simulated clearance, in order to enable himself to proceed from *Jersey* to a *Norwegian* port, and as the vessel, besides, has got neither a register nor a certificate of admeasurement, to which must be added, that the bill of health, the list of the crew, and the logbook, are forged, the vessel and her inventory cannot avoid being condemned ; because, as it is an evident offence against *Denmark* to procure admission into her ports by falsehood, which is contrary to the system adopted and publicly declared by this country, it is likewise absolutely fixed in the regulations for privateering, dated the 28th *March* 1810, that vessels which are in a situation like the present, are to be considered as lawful prizes. The captured captain has, indeed, come forward with the excuse that owing to damage sustained, he had been obliged to put into *England*, where he found himself under the necessity of selling his cargo, in order to prevent it from being totally damaged, and he uttered further respecting the forged documents, that he was obliged to have them, in order to be able to follow his intention to proceed to *Norway* for a cargo of wood, which he meant to carry from thence to a neutral port ; but the regulations for privateering are so definitive with respect to simulated papers, that these arguments can be in no case of any consideration ; and it is therefore considered as being unnecessary to make any further inquiries respecting the truth or untruth

untruth of the captain's pretexts, if even it could be considered that it was possible to throw any light upon the subject, according to the circumstances of the same. Therefore the sentence passed is, that the vessel called *Noeyssill* under the command of Captain *Martin Dicks*, which has been captured by *Peter Madjen*, interim lieutenant of the navy, with her inventory and further contents, is hereby adjudged to the captor as lawful prize. The costs of the suit are to be paid by the prize." The jury found a verdict for the Plaintiff for 200*l.* beyond the money paid into court.

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*Shepherd* Serjt. in *Hilary* term 1812 obtained a rule nisi to set aside this verdict and enter a nonsuit, upon two grounds. 1. That the voyage, being to an enemy's country, and therefore illegal, was an entire voyage from *Jersey* to *Christiana* and back, and therefore illegal as well in its inception, as in its end, and that the licence obtained, legalizing only the importing direct from *Norway*, or the sailing thither from some port *North* of the *Scheldt*, did not authorize a sailing thither from *Jersey*, which was a port *South* of the *Scheldt*, and the insurance would not protect that illegal voyage from *Jersey*, in the course of which she was captured. 2. That the ship was not sea-worthy for want of a *Pappenburgh* register, upon the want of which the sentence of condemnation had principally proceeded. Thirdly, that if the Plaintiff were entitled to recover, the verdict must be reduced to 187*l.* 11*s.*, upon the ground, that the utmost liability of the underwriter upon the contract of insurance did not exceed the sum of 200*l.* for which he had subscribed the policy, and the residue of which, 12*l.* 9*s.* the Defendant had already paid into court.

*Best* and *Vaughan* Serjts. in this term shewed cause against this rule. As to the construction of the licence, they

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they argued that it was now clearly established that licences to trade were to be expounded liberally, the opposite doctrine had been long since abandoned, first by the court of admiralty, and since by the courts of *Westminster-hall*. The policy of the government in granting these licences, was, to encourage *British* commerce, and especially *British* exportation of colonial produce, but not to encourage the commerce of the other belligerent and neutral states among each other: the meaning of the second alternative of the licence therefore was, that if the party licenced sailed from a port of the continent to the port where she was to take in her cargo, she should make that voyage in ballast, that the licence might not protect a continental cargo to *Norway* from *British* cruisers, but it did not mean to restrict the place from which the vessel should be originally fitted out, to such ports of *Great Britain* as were in a more northern latitude than the *Scheldt*, to the exclusion of ships sailing from such ports as lay more to the *South*; still less to exclude all *British* ports; and *Jersey* must be considered as a port of *Great Britain* lying *South* of the *Scheldt*. The *Scheldt* was mentioned as a *terminus* only with relation to ports of the continent. 2. The sentence of condemnation does not distinctly prove the absence of any papers, but if it does, yet it does not prove that the papers deficient were required by the law of nations; if at all necessary, they could be required only by some municipal regulation of *Denmark*, and what that is, or whether there be any such, is a matter, not of law, for the Court cannot notice the laws of a foreign state, but of fact, of which no evidence has been given. If the law of foreign countries could be assumed to coincide with the law of *England*, yet our own register acts, which are no part of the law of nations, nor even of the fundamental municipal law of *England*, being long subsequent in date to the navigation acts, do not require a certificate

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of registration for any but the ships of our own country; it cannot therefore be assumed that the law of *Denmark* requires a similar instrument for foreign ships. The certificate of admeasurement has still left to do with the law of nations, or national character, being purely a fiscal regulation. *Dawson v. Atty, 7 East, 367.* it was decided, that if a ship was not represented to be an *American* at the time of effecting the insurance, nor described as such in the policy, the want of a certificate of her having on board no contraband of war, which was required by a treaty between *Spain* and the *United States*, did not avoid a policy effected on the goods on board. The case of *Bell v. Carstairs, 14 East, 374.*, which will be cited as having over-ruled this, is much shaken by the case of *Wainhouse v. Cowie, ante, vol. 4. 279.*, where the Court held that the owner of goods was bound to see that there was a proper licence. The case of *Bell v. Carstairs* is not, however, applicable here; for there the passport in the prescribed form was required by treaty with *America*, which the *American* was necessarily bound to observe. It neither appears by any case cited, nor by any recital of the sentence, that this register is required by the law of nations; on the contrary, it appears by the sentence, that it is merely a privateering regulation, to which we need not attend.

As to the third point, it is clear that in many cases the liability of the underwriter is not limited by the amount of the subscription. This is recognized by Lord *Ellenborough C. J.* in the case of *Livie v. Janson, 12 East, 655.*, where he admits that "there may be cases in which, though a prior damage may be followed by a total loss, the assureds may nevertheless have rights or claims in respect of that prior loss, which may not be extinguished by the subsequent total loss. Actual disbursements for repairs in fact made in consequence of injuries by perils of the seas prior to the happening of the

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total loss, are of this description; unless indeed they are more properly to be considered as being covered by that authority, with which the assured is generally invested by the policy, of suing, labouring, travelling, &c. for, in, and about the defence, safeguard, and recovery of the property insured; in which case the amount of such disbursements might more properly be recovered as money paid for the underwriters under the direction and allowance of this provision of the policy, than as a substantive average loss to be added cumulatively to the total loss which is afterwards incurred in consequence of the sea risks." It is indifferent to the Plaintiff under which of these titles he recovers the sum he expended in the repairs, as he has counts in his declaration which will embrace either of them.

*Shepherd, Lens, and Marshall*, Serjts. in support of the rule, contended, that it was necessary for every ship to have a register of the country to which she purports to belong: the permission to carry simulated papers does not dispense with her having a perfect set of all those documents which denote her national character. Simulating the *Pappenburgh* flag, she ought to possess all the documents which designate the ships of that state. It is immaterial to what neutral state the ship might have belonged, but she was bound to belong to the flag of some of those nations, neutral or belligerent, whose flag is recognized and respected: it is not sufficient for her to belong to no nation, as a pirate. In *Bell v. Carstairs* it was ruled that where the neglect of the ship-owners to procure proper documents for the ship is the cause of the loss, they cannot recover it against the underwriters. And inasmuch as it is evident in this case, from reading the whole of the sentence, that the condemnation proceeded on the want of proper documents, the underwriters are discharged. Lord *Ellenborough*, in *Bell v. Carstairs*,

*Carstairs*, drew the distinction between the case of an insurance on goods and an insurance on the ship, and so repelled the use which was attempted to be made of the case of *Dawson v. Atty*, 7 *East*, 367., and he evidently acknowledges the principle that every ship is bound to be furnished with such documents as may prove her to belong to the state to which she professes to belong, whether they are required by the law of nations or by particular treaty. The register is the characteristic national distinction, the title-deed which gives a ship a right to be recognized as national. 1 *Hubner*. 210. National character is like sea-worthiness; there is an implied engagement that a ship shall be properly documented: it was formerly supposed there must be a warranty, afterwards a representation was thought necessary, but it is now held to be an implied warranty in all insurances. This ship not having it, had no right to assume the character of any nation. All the simulated papers she possessed were suited to shew she was a *Pappenburgher*, but the want of a register made them ineffectual. *Cornelia, Roese, Edwards's leading Decisions*, 34. shews that a licence to import from a foreign port, is only a licence to go to that port for the cargo by a necessary implication; here the implication is not necessary that she might legally go from *Jersey*, for it is expressed that she may go from continental ports *North* of the *Scheldt*: that is even an exclusion of *English* ports, for the absurdity and inconvenience which has been pressed on the Court, of supposing that the *English* ports *North* of the *Scheldt* are permitted, and those *South* of the *Scheldt* prohibited, affords a strong argument that all *English* ports were intended to be excluded. It is in vain to look for the reasons of the variations in the forms of licences: every licence is moulded according to the pressure of the danger which is most immediately in the contemplation of the government at the time of granting it. Either the

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licence is worded according to the election of the applicant, or the government will not grant him any licence otherwise worded than this: in the one case he is bound by his own election, in the other by reasons of policy, but in either, he must conform to the terms of his licence, however whimsical or inconvenient they may be: it is his own fault if he accepts the licence. It is not sufficient that the vessel is intended to return in the course allowed, she must also go out in the course allowed: the case would be better for her if nothing was said about the outward course, but one outward course is clearly pointed out, from ports *North* of the *Scheldt*, and *expressum facit tacitum cessare*. The licence was meant to apply only to vessels, which at the time of issuing it were in some port of *Norway*. [*Heath J.* At the time of granting this licence, all ports *South* of the *Scheldt* were hostile, and all to the *North* were neutral. *Chambre J.* I take it for granted, that under the former part of this licence, if it stood alone, the ship would be at liberty to go out in ballast, in order to bring a cargo home: now were the latter words added, in order to restrict, or to extend the licence? Clearly to extend it.] Licences are to be construed strictly. *Cosmopolite*, 4. *Robins.* 10. *Jonge Johannes*, 4. *Rob.* 263. [*Chambre J.* All the cases in *Edwards's leading Decisions* shew, that the opinion of the Judge of the Admiralty Court is directly the reverse; he gives them the most liberal construction. *Mansfield C. J.* A sailing from some port *North* of the *Scheldt* in ballast is required: and if the ship sailed from any of those ports with a cargo, she would be liable to condemnation; but it could hardly be required that she should sail from this country in ballast; because we want to dispose of colonial produce, and the like: it would be of no advantage to this country that our vessels should sail in ballast: if that licence was intended to authorize *British* ships to sail for this cargo, it would hardly require

quire them to fail in ballast.] As to the other point, whether more than 100 *per cent.* can be recovered, it certainly has been the practice in many cases to pay more than 100 *per cent.*, and the only question is, whether there be any legal ground upon which the Plaintiff can recover for a partial loss in the former part of the voyage, and for a total loss upon the latter part of the voyage. The contract extends only to the amount of 100 *per cent.*, in no case more. Expences of this nature, if they were kept within this limit, might be recovered on counts for work and labour, and for money paid, but not upon the count stating it as a loss upon the contract of insurance; a count on that contract is bad if it claims more than 100*l.*, because it sets out by averring 100*l.* to be the limit of the Defendant's liability. An assured could not recover two average losses, if they together exceeded the subscription, unless one of them could be brought within the money counts, and a count for work and labour. Although an insurance is a contract of indemnity, it is subject to various limitations; first, of the legal effect of the terms which describe the risk insured; and if the loss be by one of the risks insured, still it is limited as to the extent to which it goes. The point has not been directly decided, but in *Livie v. Jan-son*, 12 *East*, 648. is an *obiter dictum* that claims of this nature might rather be recovered under the clause giving power to labour for the ship's preservation, than as an average loss. But in answer to that, this clause has always been inserted at the instance of the underwriters, and for their benefit, whereas a payment for repairs is an average loss within the policy, and does not come within it; the species of payments which that clause was intended to comprehend, is such sums as could not be recovered as a loss upon any risk insured by the policy: as pilotage paid when a vessel is driven by the force of wind or currents into a situation from which

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the captain knows not himself how to extricate her, so, sums paid to obtain a decree in a court of admiralty for the liberation of a ship detained by a friendly state.

*Cur. adv. vult.*

MANSFIELD C. J. now delivered the opinion of the Court. This is an action on a policy made from *Jersey* to a port or ports in *Norway*, there in port and back to *London*, with or without simulated papers or clearances. The evidence is, that the ship sailed on the 3d of *December*; and was by a peril of the sea damaged to the amount of 337*l.* 17*s.* 10*d.*: and the declaration avers this loss, and that the assured laboured and travailed to the amount of 337*l.* 17*s.* 10*d.*, contributable by the Defendant to the amount of the sum insured; afterwards the ship was captured. The action was brought to recover not only the entire loss insured, but a proportion of the 337*l.* 17*s.* 10*d.* The voyage could not be legally insured without a licence, and it is objected that the licence obtained did not authorize this voyage. There are two provisions in this licence, the first that the ship may import a cargo direct from any port in *Norway*; the second provision of the licence is, that the ship may sail in ballast from any port *North* of the *Scheldt* to any port in *Norway*; and it is objected, that these have not been complied with. I have had considerable doubts, but I think that on a fair construction of this licence, it does protect this voyage. If there was nothing more than the first branch of the licence, according to Sir *Wm. Scott*, it would authorize this ship importing from *Norway*. That part taken alone, I think, must have the effect of authorizing the going from any port of *Great Britain*, otherwise the licence would have this effect; that although the ship might sail legally from many ports of *Great Britain* which are *North* of the *Scheldt*, yet she could not sail from many other ports of *Great Britain*.

*Britain*, because they are *South* of the *Scheldt*; which it is impossible to think was meant; and the only other ships that could be included, would be such ships as happened to be in the ports of *Norway*, *Sweden*, and *Denmark* without the *Baltic*, at the time of granting the licence. It would be a very singular licence, to say, that a ship may sail from any ports of *Great Britain North* of the *Scheldt*, but not from *British* ports lying *South* of the *Scheldt*, and from the ports of *Norway*, *Sweden*, or *Denmark* without the *Baltic*. Another objection is made, that the ship had not a register: as to that point I have had considerable doubts; I do not know what is meant by a register as applied to a *Pappenburgher*. Whether it is similar to our register here, or whether it is a register of the crew, I cannot tell; nor can I find any ground, either by treaty between *Denmark* and *Pappenburgh*, or otherwise, which renders this register necessary. We fully agree with the case of *Bell v. Carstairs*, where the objection was the want of such a licence as was required by the treaty with *Spain*: I think that a ship must be properly documented, otherwise she will never be safe. But we want evidence to shew on what reasons the want of this register was made the ground of condemnation. It is necessary to notice the case of *Dawson v. Atty*, in which there is a very nice distinction between a policy on ship, and a policy on goods; it might be said in every case of a policy on goods, where the defence was seaworthiness, that the owner of the goods may have an action against the owner of the ship, for not being seaworthy in other respects, as well as for not being seaworthy because she is not properly documented; but it has notwithstanding always been held an answer to an action on a policy on goods, that the ship was not seaworthy. It is not however necessary for us to decide that question here. In the case of *Bell v. Carstairs*, the deficiency was in a necessary document, and the want

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of it was necessarily a sufficient ground for the decision in that case. It might be, that the want of a paper required only by the treaty with another country might be a fatal objection; but it is not necessary to decide that point, as there is not even proof that any treaty with *Denmark*, or ordinance of that country required it. As to another point, respecting the double loss, this policy of insurance is a very strange instrument, as we all know and feel; in practice I know of cases in the Court of King's Bench, where such expences have been recovered as an average loss, without making any distinction whether it was recoverable as an average loss from damage repaired, or within the words of the permission to "sue, labour, and travail, &c.;" and as no such distinction has been made, we find it safer to adhere to the practice which has obtained, and to call it all average damage; and therefore the rule must be discharged as to the whole sum.

Rule discharged.

May 11. GRANT and Others, Assignees of ATKINSON, a Bankrupt, v. HILL.

The Defendant having, for securing a debt, taken an indorsement of the bills of lading of certain cargoes, which was void because made after an act of bankruptcy committed by the indorser, effected for his own account an insurance on the cargoes; and a loss happening, he recovered against the underwriters on a count averring interest in the assignees of the indorser, then a bankrupt: Held that the assignees could not recover over this money, as had and received by the Defendant for their use.

THIS was an action for money lent and advanced, money had and received, and upon an account stated. The cause was tried at *Guildhall*, at the sittings after *Michaelmas* term 1811, before *Mansfield* C. J., when it appeared that *Atkinson* had had extensive transactions in trade with *Jacobi* and *Hill*, a house in *Russia*;

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and the defence was, that *Hill*, a partner in that house resident here, had, before the act of bankruptcy committed by *Atkinson*, advanced money upon this cargo to a greater amount than the value of the cargoes, which he contended he had a right to set off. There was an indorsement of the bills of lading to *Hill* made after the bankruptcy by *Atkinson*, and the Defendant contended that though that would be bad as an original transfer, it was good, as the perfecting by a trustee of the legal title to a cargo, which had been equitably pledged to *Hill* before. But the jury disaffirmed the previous pledge. *Atkinson* was in very doubtful circumstances, and was about to send three large cargoes of wine to *Russia* to this house. The wines were on board vessels lying at the *Nore*. *Hill* wanted these wines to be consigned to his house in *Russia*. *Atkinson* doubted whether he should not send them to *Riga*, unless *Hill* would in some way accommodate him with money. At last *Atkinson*, after having committed an act of bankruptcy, agreed to consign the cargoes to *Hill* and *Jacobi* in *Russia*. The invoices were antedated, so as to make them apparently prior to the time which the Defendant supposed to be the date of the act of bankruptcy. *Atkinson* intended to insure the goods, and on the 19th and 21st of April *Atkinson* the son had effected insurances on ships in the elder *Atkinson*'s name; but the house having stopped payment on the 23d, the underwriters would not put their names on the policies, and *Atkinson* found it impracticable to effect an insurance. His assignees knew nothing of these transactions. *Hill*, conceiving that he had an interest in the cargoes, insured these goods as his own, upon his own account. A total loss happened by capture, and *Hill* sued the underwriters in the King's Bench, and in one count averred the interest to be in himself, and in another in the assignees. In that action, on an enquiry into the circumstances, the Judge

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who tried the cause, held that the property of the cargo was not in *Hill*, he not being able to prove the procurement by which the son of *Atkinson* had indorsed the bills of lading to *Hill*. There was a recovery on the count which alleged property in the assignees, but not on that in which the interest was averred in the name of *Hill*. The assignees thereupon brought the present action, and the question was, whether they could recover from the Defendant this money which he had recovered on the insurance made by him for his own benefit only. A verdict passed for the Plaintiffs for the damages in the declaration, subject to a motion for a nonsuit, on the ground that the action would not lie, and also subject to future adjustment as to the amount.

*Lens* Serjt. in *Hilary* term 1812 obtained a rule *nisi* to set aside the verdict and enter a nonsuit, upon the ground that though the policy might be void for want of interest, yet the money which the Defendant had received was not money had and received for the use of the assignees; the policy not having been effected by their authority, or for their benefit, or on their behalf, or for the use of *Atkinson*, but on the Defendant's own account and risk, and with his own money; and the utmost that could result from the circumstances being, that the underwriters might possibly recover back this money from the Defendant as money had and received to their use, as having been paid by them through a mistake.

*Shepherd* and *Vaughan* Serjts. in this term shewed cause against this rule. They contended that *Hill*, having received the money as the money of the assignees from the underwriters, (and he could receive the money in no other name,) he should not be permitted now to keep it in his own pocket. If he had sued and recovered

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in the assignees' names, and the assignees had received the money under that judgment, the Defendant would have been estopped from claiming it of them, and from saying he did not recover the money for their use. The judgment, it is true, is in the name of *Hill*; he is the Plaintiff on the record; but the verdict is given to him as agent of the assignees, and as the person who effected the policy for them. It is acknowledged on the declaration in that action against the underwriters, that *John Hill* in his own name for the benefit of the persons interested, effects this policy. He cannot therefore now say he did not effect it for their interest; but for his own. He is like an agent, who, recovering from the underwriters as such, should afterwards say he was not agent, and should keep the money for himself. If the Defendant had received the money as a stranger, he might perhaps have a right to retain it to himself; but he makes use of the name of the assignees to recover it, and he cannot be afterwards permitted to say that he did not receive the money for them, having stated on the record that he insured for the benefit of all persons interested. The cause wholly turns upon this, whether the cargoes were ever pledged to *Hill* for the advances he had made, and the jury has disposed of that question.

*Lens* and *Boss* Serjts. in support of the rule, admitted that if the Defendant had received the money as agent for the assignees, no doubt they could recover it as money had and received. But he never was their agent. There were no policies effected on this property in the name of the assignees, only insurances put on slips; and though indeed *Hill* said that he must himself take care of the insurance, he took it merely upon his own account. The bills of lading are indorsed to the order of *Atkinson* senior. The true point is, what action could *Hill* have brought

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brought against *Atkinson*, or the assignees, to recover the premiums? For if agent, he must have a remedy. The assignees never have offered to pay the premiums, or to reimburse them; the Defendant had paid them out of his own pocket, and never could have recovered them back again. He never claimed the money of the underwriters as agent for the assignees. They never directed the action to be brought, nor were responsible for the costs of it; nor can they now take from him the fruits of that action. The form of the policy is "on behalf of himself and all others to whom the same doth or may appertain in part or in whole:" and it was only at the trial that the assignees for the first time discovered that *Hill* had not a good legal title to the goods; so far were they from having first employed *Hill* as their agent. Whether the underwriters can or cannot hereafter say that this was a wagering policy, and that the Plaintiff having no interest, they may therefore recover back the amount as money paid without consideration, is another question. The underwriters may possibly have a right to say, that these were void policies, and that they have paid to the Defendant money which he cannot retain (a). But that gives no right to the assignees. If a person insures the life of another in which he has no interest, that is void; but it will not give a person who is interested a right to recover on the contract in which he has no privity. *Hill* made the insurance in his own name and right, and if he deserts that title and recovers in right of another, that may possibly enable the underwriters to claim it back, but will not enable a third person to receive it from the Defendant, who insured under the mistaken idea that it was his own property, not as agent for all to whomsoever the property should belong. It is begging the question to say the money

(a) But see *Marriott v. Hampton*, 7. Term Rep. 269. *Contrà*.

must ensue the property of the goods, and the proceeds of the goods. If *Atkinson* had maintained his credit, *Hill, Jacobi, and Co.*, being agents for *Atkinson*, would have had a right to retain the proceeds for liquidating their general balance, accounting for them. The Defendant, being deeply a creditor of *Atkinson*, if the goods arrived, would be paid by the proceeds; he had therefore an insurable interest that the goods should arrive. This is no estoppel, to introduce in one count the names of the assignees, and to use them as trustees for the Defendant.

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*Cir. adv. vult.*

MANSFIELD C. J. now delivered the opinion of the Court. This was an action brought by the Plaintiffs, as assignees of *Atkinson*, to recover money which had been received by *Hill*, as having been received for the use of the Plaintiffs, as assignees of *Atkinson*. It is brought under very singular circumstances. *Atkinson* being insolvent, manufactures bills of lading of some wine to *Hill*, in order to be conveyed to *Russia*, to be sold there by a house in which *Hill* was a partner, under an agreement, immaterial to the present question, I think, with respect to the proceeds of that cargo, to remit three-fourths of the proceeds to *Atkinson*, under the hope that *Atkinson* could be kept afloat. *Atkinson* had applied to several underwriters to insure the cargo, and several had put their names on the slips, but after hearing of his insolvency, they refused to complete the policy. Young *Atkinson* is induced by *Hill* to hand him the bills of lading, and *Hill*, having obtained them, effects an insurance on these wines: after some time spent in examining witnesses, it appears impossible to make out in *Hill* a title to these wines, because an act of bankruptcy was committed long before the making of the bill of lading of the wines,

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wines, and the bill of lading itself was antedated. The wines are lost, and *Hill* sues on these policies; in one count he avers interest in himself, on which, he having no title to the wines, it was impossible that he should succeed; there was another count in the name of the assignees of *Atkinson*, on which he recovered a verdict, and had the money paid him; and it was conceived by the assignees, no doubt after consulting with their counsel, that they could recover from *Hill* this money, which he had, without consideration, recovered from the underwriters. It was not unnatural that they should so conceive, but I cannot, upon considering the case, find any ground on which *Hill* can be converted into an agent, trustee, or in any other way recovering for the benefit of the assignees, so as to give them a right to sustain this action, and so as to raise a legal demand in the assignees against *Hill*. It may be a different question whether the underwriters can bring an action against *Hill* to recover back this money recovered by him, on an insurance which *Hill* had no right in truth to make, because the instrument under which he made title to the wines, was invalid: but that question we cannot meddle with here, that is a question between the underwriters and *Hill*; but even if a man does make an insurance in the name of another man, upon a subject in which he has no pretence to claim any interest, I do not see how that can be made the subject or ground of an action by the man in whose name the insurance is made, to recover the money which has been without any consideration obtained by the Plaintiff in the former cause: therefore in this case the Plaintiffs certainly cannot recover, and on this ground the rule must be

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THESE were actions upon a policy of insurance at and from *London* to any port or ports, place or places in the *Baltic*, backwards and forwards, including the risk of transshipment into boats, craft, lighters, and vessels of any denomination, to and from the vessel, as also inland navigation, and land carriage, or any other conveyance, until the goods were safely delivered at the houses or warehouses of the different consignees; with leave to seek, join, and exchange convoys, carry and exchange simulated papers, clearances, and ship's papers, sail under any flag, touch, stay, and trade at any ports, places, and islands, particularly *Gothenburgh* and *Ystad*, for all purposes whatsoever, take in and discharge goods wherever the ship might touch at, and (in case the commander of the vessel should find it dangerous to enter either of the above ports and places, or not be allowed to discharge the cargo,) with leave to return to any ports and places, until the goods were safely landed and housed or warehoused; upon goods by the ship *Courier*, with leave to declare and value them thereafter; the insurers to pay average separately on each species of goods as if so insured, and on each separate package: the declaration of interest to be witnessed by two of the underwriters, which should be considered as binding for the whole; and in case of loss, capture, seizure, or detention by any power whatever, the insurers were to pay a loss within two months after receipt of advice thereof, without waiting for official documents. And the goods were thereby warranted free from confiscation by the government in the ship's port or ports of discharge. The causes were tried at the sittings after *Michaelmas* term 1811 at *Guilfordhall*, before *Mansfield C. J.*, when

A policy contained a warranty by the assured against confiscation by the government in the ship's port of discharge. A vessel destined to discharge at *Pillau*, anchored two *German* miles from *Pillau*, three *English* miles without the roadstead where vessels unload in order to come over the bar into the inner harbour; and was captured at her moorings by soldiers coming off in a boat from *Pillau*: Held that this loss was not within the warranty.

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when the facts proved, and afterwards agreed on by the counsel in their attempt to frame a special verdict, were, that the Plaintiff effected, and the Defendant subscribed the policy; that the insurance was declared to be on the goods specified in a memorandum indorsed, and the goods were valued; that the goods were shipped at *London*, and that the interest was as averred: that a licence was obtained for the adventure, under conditions which were complied with by the Plaintiff; that on the 1st of *October* 1810, the vessel with the goods insured on board her, sailed from *London* on the voyage insured towards *Pillau*, the port to which she was destined, and on the 14th day of *November* in the same year, in the course of the said voyage, and whilst proceeding thereon towards the port of *Pillau*, in the *Baltic*, for the purpose of there discharging her cargo, if not found dangerous by the commander, but before her arrival in that port, or in the roads thereof, was on the high seas forcibly seized and taken possession of by certain persons exercising the powers of government at *Pillau*; and the ship was afterwards forcibly carried into the roads of *Pillau* by the persons who had so seized her, who after having discharged in the roads a part of the cargo from the ship into lighters at the place to which she was so forcibly taken, conveyed the ship, with the residue of her cargo on board her, into the port and harbour of *Pillau*, and the goods so put into the lighters, and the rest of the cargo, were on the 20th of *December* 1810 condemned and confiscated by the sentence of a competent tribunal at *Königsberg* in *Prussia*, and thereby were wholly lost to the several persons interested; and that the place where the ship and cargo were lying when so seized was not (according to the Plaintiff's expression) *in any port*, and that no ship or vessel was ever known to discharge, or could safely discharge her cargo, or any part thereof, at that place; nor was any part of the cargo of this ship, the *Courier*, there  
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discharged. There were also questions upon returns of premium for convoy and arrival, which it ultimately became unnecessary to decide. The Defendant contended, that the question whether the ship was in port was matter of law, and conceived that a special verdict thus expressed, determined the point of law: he therefore was desirous to vary this statement, by expressing the facts found, to be, that the ship on the 14th of November 1810 arrived within eight *English* miles of *Pillau*, the port to which she was destined, and came to an anchor there at the distance of eight *English* miles from the shore, with the intention of proceeding nearer, when an opportunity offered; and that on the 17th of November in the same year, while the ship continued at anchor in the same situation, she was forcibly seized and taken possession of by certain persons exercising the powers of government at *Pillau*, and was afterwards forcibly carried nearer to *Pillau* by the captors; and that when seized, she was not lying in any "place usually denominated" port. The evidence, upon the effect of which the question arose, was, that the vessel came to anchor on the 14th November in about 16 fathoms water, about two *German* or nine *English* miles from the shore, and was not at that time in the roads of *Pillau*; she lay there, the master remaining on board, till the 17th, when a boat with three soldiers came out from *Pillau*, and carried her into the inner harbour; the roads of *Pillau* terminate about one *German* mile from the shore. It is usual for vessels to unload part of their cargo before they go into the inner harbour of *Pillau*, when they draw too much water to go in without it. Part of her cargo was unloaded by the captors in the outer roads. Many ships were in the same place waiting their turn to unload, and get in over the bar. A merchant on shore, to whom the cargo was consigned, was waiting an opportunity to apprize this vessel of the

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danger of going into *Pillau*, but could not effect it: the vessel, however, was not waiting for information at the place where she cast anchor, but for an opportunity to get in; and the question upon which the defence turned, was, whether, as the ship was seized by a force coming out from her port of discharge, while she was waiting off the port for an opportunity to get in, this loss was not within the warranty. *Mansfield* C. J. directed the jury, that if they thought that the vessel was seized without the port, the capture was not within the terms of the warranty. The jury found a verdict for the Plaintiff generally, subject to the point reserved, and with liberty, in the second case, to turn it into a special verdict.

*Vaughan* Serjt. in *Hilary* term 1812, obtained a rule nisi to set aside the verdict and enter a nonsuit, against which

*Shepherd* and *Best* Serjts. in this term shewed cause. They urged that this could not be considered as a capture within the ship's port of discharge, the ship when captured being three *English* miles further out at sea than the place where vessels were usually known to unload, and where the vessel was captured in the case of *Brown v. Tierney*, ante, 1. 517.; yet in that case the Court held that the warranty did not discharge the underwriter. *Le Blanc* J. has, in the case of *Dalglish v. Brooke*, (since reported, 15 *East*, 306.,) confirmed the decision of this Court, that it makes no difference whether the capturing force comes from the port of discharge, or from any other quarter; for he acknowledges that "the mode of capture in the place, either as made by boats from the shore, or by privateers, or ships of war, from the sea, is not the criterion for ascertaining the description of the place where the capture was made,

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for that whether a capture be or be not made in port, must depend upon the place, and not on the mode of capture." If a vessel were in a situation where she was commanded by the guns of a fort, perhaps that might be a medium to ascertain the extent of the port, but that is not the case here. The intention of the master to go into that port can make no difference. An intention to deviate is not a deviation. In *Dalglish v. Brooke*, the captors actually did begin to unload the vessel in the spot where she laid, in order to lighten her. Lord *Ellenborough* in his judgment adverts to this: he says, "If the assured chose to come for the purpose of discharging his cargo within the danger of a land risk," it would be within the warranty. In *Jarman v. Coape*, 13 *East*, 394. the ship was landlocked in the *Jabde* by the headlands at the mouth of the river: the place where this ship was captured was open sea. If it were intended that a force issuing from and sent by the government from the port of discharge should be within the warranty, although the vessel was without the port, then every capture by a force sent out by that government, in whatsoever part of the globe the capture might be effected, would be within the warranty. The intention of this contract merely was, that, when the vessel was in her port of discharge, she should not be taken by an enemy, sent by the government of that port, in the port. It is not unusual for the assured to warrant, in larger terms, against capture while lying off a port; but that is a different contract from this. This vessel was not got to a place which possibly could be her port of discharge.

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*Lens*, *Marshall*, and *Vaughan* Serjts. in support of the rule. The literal interpretation of the words has never been looked to by the Courts. In *Dalglish v. Brooke* the warranty was against a capture in the port of discharge,

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but it was held to include a capture in an open roadstead. The Court must look to all the circumstances of the case, in order to discover the true meaning of the parties. The Court will seek some broad, plain, intelligible principle, not depending upon the local limits of the roads, or of the port, and such a principle has Lord *Ellenborough* adopted. It was the plain meaning of both parties, that if this ship were taken either in, or coming into, her port of destination, the underwriters should be exempt from the loss, with one qualification, that the force should come from the port of destination. The warranted capture must be by the government of the place, not as in the cases of the captures by the *Tifft* privateer, of which *Brown v. Tierney* was one, by an extraneous invading force. It is not therefore, as it has been supposed, immaterial, whether a land or a sea-force effect the capture. In the case of *Dalglish v. Brooke*, the fact of the ship's discharge in the spot where she was captured is supposed to have made that spot an elective port of discharge; but that only shews, that not the mere letter, but the spirit of the contract is to be attended to. There is no sense in the distinction, that the unloading was in the spot where the ship first chose to lie. She might shift her ground. The more enlarged view must be, that the port means the place where she is to unload, and whether it be 9, 8, or 7 miles distant from the shore, whether within the road, or within the *caput portus*, can make no difference: since the warranty extends without the port, strictly so called, it is not necessary the ship should be within the roads. If the Courts once abandon the strict letter of the warranty, as they have done, they can put no other limit, than to say, that every ship stopping here, whether within or without the roads, is within the warranty: that when she casts her anchor, and makes her election of a market, she is come to her port, and her waiting the possibility of time and season with a view to bring her  
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somewhat nearer to her port, signifies not: she has past her voyage by sea, and is come to her port. Undoubtedly, if she had chosen to lie off at a great distance, for the sake of preserving her liberty of election, in case her coming nearer would take away her option of proceeding further, it would have been different: but whether she is in that situation which may make it convenient for her to drop in a mile or two nearer before she discharges her cargo, signifies not. *Dalglish v. Brooke* certainly goes on this ground, that the ship was come to her port of discharge, and was not destined to any ulterior place. The spirit of Lord *Ellenborough's* judgment is, "How can we adopt the meaning given to the word 'port' in this narrow sense? Whenever a ship enters from the high seas into any haven, and has selected that as the place of her discharge, there the underwriter's risk is at an end;" but even in that case the ship was not within the haven. This is therefore the port of discharge, not because the vessel was locally within the port, but because she had got to the place where she was to stop, in order to adopt such further measures as the circumstances should require. The only question is, whether she was got to *Pillau*? Had she quitted the high seas, as to all purposes of sailing on the high seas? Had she cast her anchor with any other purpose than to get further in to her port of unloading, when opportunity serves? The fact is proved, and the risk is therefore thrown off the underwriters, on the assured. This is wholly a new case. [*Chambre I.* The ship must be taken within the limits of the government: it is not brought within the warranty merely by reason of the government sending out a force; that force may take the ship at any distance. The word confiscation does not apply to a ship taken at sea. This place is out of the reach of the guns.] *Dalglish v. Brooke* does not militate with *Brown v. Fierney*, because the policy

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policy in that case never was intended to protect the underwriters from such a risk.

MANSFIELD C. J. This case of *Dalglish v. Brooke* certainly cannot be reconciled to the decision in *Brown v. Tierney*. There is no solid distinction between the latter case and this. The intent of the parties who entered into this contract certainly was, that whether the ship lay 5, 6, or 7, or 8, or 9 miles from the shore, if she could be taken by one or two soldiers going out in a boat, which never would go out to what is properly called the open sea, or by any such force coming from the government of the country, the underwriters should be protected; but the contract is such as the parties have made it; and if it does not effectuate their purpose, the Court cannot apply a remedy. It is very desirable that the decisions of the Courts should agree, and the case of *Brown v. Tierney* is very much shaken by that of *Dalglish v. Brooke*.

*Cur. adv. vult.*

MANSFIELD C. J. now delivered the opinion of the Court. He recapitulated the terms of the policy, and the warranty to be free from confiscation by the government in the ship's port or ports of discharge. There certainly have again and again been recoveries in cases where as in that first case of capture by a privateer from *Dantzic*, and another case of capture off *Wifinar*, the underwriters have been made liable for the capture, being a capture of that very port which they intended to guard against, but had not sufficiently expressed, *viz.* any port of capture by a force issuing out of the port to which they were destined. In this case I am not sure that they did not mean to express "any port of capture by the government of the ship's port or ports of discharge:" if they

they had said "of" instead of "in," they would have been safe; and I have looked at it again and again, to see if I could give the same sense to the word "in," as to the word "of;" but I think it cannot be done, and it was not contended that it could be so construed. It might have happened in this, as in many other instances, that the ship went into the port, for the very purpose of giving notice of her circumstances, and that the soldiers might come out to take her. In this case certainly the ship intended to go into *Pillau*, and all on board intended it; she was clearly not waiting off the port to gain intelligence: she had no idea of waiting for information, it was decided that she should go into *Pillau*; and the question is, whether having come to an anchor with that intention, she should be deemed to be within the port. It was clear that this ship was not got into the roads of *Pillau*, she was in a place where no ship had ever begun to unload, one, two, or three miles without any place where ships have ever been accustomed to unload. Can we then say that the underwriters are protected under this warranty? Under this word "in," the capture or confiscation must begin in the port of discharge, and we cannot say that the loss comes within the warranty, because she was very near it, but was not "in" her port of discharge. I was in hope that the Court of King's Bench would have carried this warranty further in their interpretation in the case from the port of *Wismar*, but they have not done it. Considering both cases therefore, we must say, that we cannot discharge the underwriters from this risk, and that it is not within the warranty. In the case of *Dalgeish v. Brodke*, in the Court of King's Bench, the ship was actually in a place where ships began to unload, and where she did unload: we must therefore say, that the Plaintiffs are entitled to recover. The underwriters have certainly been very unfortunate in the

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the choice of their expressions, but such is the contract they have made, and this is our interpretation of it.

Rule discharged.

The Court extended the permission to turn the case into a special verdict to both the causes, and all others upon the same policy, on bringing the money into court within a week.

In *Michaelmas* term 1812, the counsel having been as before mentioned, unable to agree on any terms descriptive of the facts of the case, which would not, as they conceived, be conclusive of the question on the one side or the other, *Shepherd* moved that the Court would settle the special verdict.

*Per Curiam.* The Court did not hear the cause tried: how can they say in what terms the special verdict shall be drawn.

*Lens* and *Vaughan* Serjts. urged that the parties wanted to raise the question of law, and prayed that if the Court could not settle the special verdict, then the Defendants might be allowed to put it into the shape of a bill of exceptions, or a demurrer to evidence; as the parties wished to argue the doctrine, in which they conceived themselves supported by the case of *Jarman v. Coape*, that every place where a ship is, or can be taken by a land force issuing from the port, is a place within the port.

MANSFIELD C. J. As you now state the fact, it is quite ridiculous to turn this case into a special verdict: if the ship was at the distance of two *German* miles, it

is impossible to contend she was in port. According to the Defendant's doctrine, if a ship in the very bar of *Pillau* is taken by a privateer from another place, which, in violation of the neutrality of the port, runs in, and takes the vessels, the Court ought to hold that that was not a capture in port. [*Lens* admitted this consequence.] I really do not think this Court ought to give their sanction to a special verdict to be carried to another court upon a point, upon which no sort of doubt can be raised; and unless we can overturn every case which has been hitherto decided, in both courts, there is no point here: if the fact had been found the other way, and the ship had begun unloading at this place where she lay, there might have been a question; but we cannot do it, where we have not a doubt upon the point. The consequence is, that there must be a judgment for the Plaintiff.

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HEATH J. A bill of exceptions would not aid the Defendant. If the point cannot be raised, the verdict must stand.

CHAMBRE J. If the Defendants had tendered a bill of exceptions at trial, it would not have subjected the Court to the imputation of sanctioning an absurdity; but to permit it to be tendered now, would be the special indulgence of the Court, and would be giving it their sanction. The term confiscation most strongly implies that the ship is to be within the limit of a municipal jurisdiction, where the municipal force will come out and take her; besides, it is to be proved on the Defendants' part, what are the limits of the port of discharge, in order to shew that the ship came within it, but he does not shew that.



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GIBBS J. Whether the ship was in port or not, is a fact of which the Court cannot judge merely from seeing that the ship anchored at such and such distances from such and such points. I was very desirous to hear my brother *Vaughan*, because I was fully of opinion with the Plaintiff's counsel, and wished to be corrected if wrong. No special verdict can be made in this case certainly. The evidence was, that the ship was intended to go into port, not that she was in port; and upon the facts stated by the Chief Justice, there can be no point. The Defendant will remember it is for the underwriters to bring themselves within the exception, by shewing that she was in port when taken: it is not for the Plaintiff to shew she was not in port. I think the Defendants rely too much from *Dalglish v. Brooke*. No doubt the underwriters meant to guard themselves against all land captures: but in order to obtain that end, they ought to have made a more appropriate contract. They thought they should attain it by guarding against all captures in port, but it is against captures in port that they have guarded. It is cited by the Defendants' counsel as the doctrine of the Court of King's Bench in *Jarman v. Coape* that that Court has extended the term "port" so widely as to cover all land risks. To what extent that Court would extend the principle, the Defendants do not say, but I do not apprehend the Court of King's Bench have gone so far, as to hold that to be the port, where vessels do not unload. See what monstrous consequences it would lead to, if either when a vessel having arrived in the port, is captured in the port by an extraneous naval force, that is not to be deemed a capture in the port; or if, when a vessel lying at any distance out of the port, is captured by a force issuing out of the port, that is to be considered as a capture in the port! It is impossible to contend that this doctrine is

to prevail. The language of *Le Blanc J.*, in *Jarman v. Coape*, which is relied on, does not warrant the inference. If the ship comes within the haven, and lies there, meaning to begin to unload her cargo in that place, I do not think there will be any difficulty in saying that she is within the port! And Lord *Ellenborough* left it to the jury, who, with their usual good sense, found she was then in a spot exempt from most sea risks, and liable only to the risks of the spot where she intended to unload.

Judgment for the Plaintiff.

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END OF EASTER TERM.



# C A S E

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ARGUED AND DETERMINED

IN THE

EXCHEQUER-CHAMBER,

IN

Easter Term,

In the Fifty-second Year of the Reign of GEORGE III.

BURDETT, Bart. v. The Right Honourable  
CHARLES ABBOT, Speaker of the House of  
Commons.

April 22.

THIS was a writ of error brought to reverse a judgment of the Court of King's Bench, given for the Defendant, upon a demurrer to his second and third

To an action of trespass against the Speaker of the House of Commons for forcibly,

and, with the assistance of armed soldiers, breaking into the messuage of the Plaintiff, (the outer door being shut and fastened), and arresting him there, and taking him to the Tower of London, and imprisoning him there; it is a legal justification and bar to plead, that a parliament was held, which was sitting during the period of the trespasses complained of; that the Plaintiff was a Member of the House of Commons; and that the House having resolved "that a certain letter, &c. in *Cobbet's Weekly Register*, was a libellous and scandalous paper, reflecting on the just rights and privileges of the House, and that the Plaintiff, who had admitted that the said letter, &c. was printed by his authority, had been thereby guilty of a breach of the privileges of that House;" and having ordered that for his said offence he should be committed to the Tower, and that the Speaker should issue his warrant accordingly; the Defendant, as Speaker, in execution of the said order, issued his warrant to the Serjeant at Arms, to whom the execution of such warrant belonged, to arrest the Plaintiff, and commit him to the custody of the Lieutenant of the Tower; and issued another warrant to the Lieutenant of the Tower to receive and detain the Plaintiff in custody during the pleasure of the House; by virtue of which first warrant the Serjeant at Arms went to the messuage of the Plaintiff, where he then was, to execute it; and because the outer door was fastened, and he could not enter, after audible notification of his purpose, and demand made of admission, he, by the assistance of the said soldiers, broke and entered the Plaintiff's messuage, and arrested, and conveyed him to the Tower, where he was received and detained in custody, under the other warrant, by the Lieutenant of the Tower.

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pleas, in an action of trespass. The pleadings, arguments of the counsel in the court below, and judgment of that Court, are fully reported, 14 *East*, 1. The writ of error was argued in the Court of Exchequer-chamber in *Hilary* term 1812, by *Clifford* for the Plaintiff in error, and *Richardson* for the Defendant in error, and in the present term *Clifford* was heard in reply, and the Court immediately gave judgment.

*Clifford* inverted the order in which Lord *Ellenborough* had in his judgment, 14 *East*, 134. considered the points of this case, and professed to examine, first, Whether the means which had been used for the execution of the Speaker's warrant, supposing the warrant valid, were by law justifiable; secondly, Whether, supposing the House to have such an authority in general, it had in this case been well executed by the warrant, such as it was disclosed by the pleadings; and, thirdly, Whether the House of Commons has by law any authority to commit in cases of libel as for a breach of privilege; and he contended, first, that it was not made out, either upon the ground of reason and necessity, or by the evidence of usage and practice, by any legislative recognition, or by any well-established precedents and authorities of the judgments of the Courts of law, that the House of Commons had power to commit for such contempts as this.\* Secondly, That the resolution of the House, that the Plaintiff had been guilty of a breach of its privileges, and the order made for his commitment for that offence, were not in conformity to their power; that the warrant made by the Speaker, embracing the resolution and order of the House, was not made in the due execution of their order, and that the mode of executing the warrant, by breaking the House, after due notification and demand of admittance without effect, was not justifiable on the ground of its being a process of contempt,

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contempt, to which the personal privilege of the individual in respect to his House, must give way for the public good. As to the first point he made a marked distinction, and denied that it ever had been, or would be argued for the Plaintiff in error, that the House of Commons had not, like every other Court, authority to commit for a contempt. But this was a commitment for a libel, a past transaction, not tending to any obstruction of the proceedings of the House; and if they might commit for a libel under those circumstances, they might, for the like reason, commit at the meeting of Parliament, after an adjournment for 15 months, for a libel published while the House was not sitting. He observed that the course of proceeding by action was not only more respectful to the House than a proceeding by *habeas corpus* would have been, but also more effectual, for that it would have been impossible to raise upon the return to a writ of *habeas corpus* many of the points which were raised by this action. For instance, if such a writ had been directed to the lieutenant of the Tower, he would have returned that he had the prisoner in custody by virtue of the Speaker's warrant; but his return would not have shewn the military force which was employed in taking him, nor the breaking of the house. A great mistake had pervaded all books and speeches on this subject, in confusing the High Court of Parliament, which consists of King, Lords, and Commons, with one branch of it. The Court of King's Bench have said that the two Houses formerly sat together, and that though it be within time of memory that they separated, yet each hath retained its share of the authority. But if this were to be pleaded, it would be necessary to verify the plea by proof, and there is not even a *dictum* or passage in any writer of authority that they ever did sit together. The 49th of Hen. 3. is

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the first period at which the House of Commons has been mentioned to exist, and it does not appear that the two Houses then sat together. There is no evidence that ever they sat together, except when they met for the purpose of hearing the king's speech, or on conferences, or on impeachments in *Westminster-hall*. But if they sat together, it does not follow that each separately had the same power as the whole united. If by separation they retain that power, *pari ratione*, a committee of the House of Commons is endowed with the like power to commit for a contempt, which was never yet contended for. The warrant does not shew where the libel was published, or under what circumstances: therefore this Court is to resolve, whether the publishing a libel, generally, and under all circumstances, is a contempt of the House of Commons. As in *Fitzharris's* case, 9 *Com. Journ.* 26 March 1681, where an impeachment having been preferred by the House of Commons, the House of Lords had refused to proceed on the impeachment, thinking it was a case for the judges of the land, and the House of Commons had resolved that for any inferior Court to proceed against *Fitzharris*, or any other person lying under an impeachment in parliament, for the same crimes of which he or they stand impeached, was a high breach of the privilege of parliament, and the Court of King's Bench tried him, and he was executed; the House of Commons committed Sertj. *Beit*, who argued it, for a contempt. Suppose they had committed the Judges of the Court of King's Bench, would this Court entertain jurisdiction of that case, or would they say the Court of the House of Commons was so paramount, that they could commit the judges of the land for deciding according to the law and their oaths? It is said, this being a commitment for a contempt, no other Court can relieve. In *Bigbell's* case, *Van. 139*. *Vaughan C. J.* cites

two cases from *Moor*. 839. of persons committed by the Chancellor upon a contempt, and upon return thereof made to a writ of *habeas corpus*, admitted to bail; and in *Moor* are eight different precedents of persons committed by the Chancellor, and High Commission Court, and Privy Council, who were liberated by the Court of King's Bench. And is it not to be supposed that the Lord Keeper, and those Courts, understood the extent of their authority to commit, as well as the Court of the House of Commons, and that if the Court of King's Bench had exceeded its jurisdiction, they would have asserted their privileges? These are not the only cases where the Court of King's Bench hath discharged persons committed, on account of the generality of the commitment. *Selden*, 6th vol. 1958., argument of 7th April 1628, on the personal liberty of the person of every freeman: in page 1970 is Sir Samuel Saltonstall's case, *Hil. 12 Jac.*: "he was committed to the *Fleet per mandatum domini regis*: and besides, by the Court of Chancery, for disobeying an order of that Court, and is returned upon his *habeas corpus* to be therefore detained: and it is true that a *remittitur* is entered on the roll, but it is only a *remittitur prisone predict.*, without *quousque secundum legem deliberatus fuerit*; and in truth it appears on the record, that the Court gave the warden of the *Fleet* three several days, at three several times, to amend his return; and in the *interim*, *remittitur prisone prad.* Certainly if the Court had thought that the return had been good, they would not have given so many days to have amended it. For if that *mandatum domini regis* had been sufficient in the case, why need it to have been amended?" In *Tr. 13 Jac. ret. 71.* the case of the same Sir S. Saltonstall, "he is returned by the warden of the *Fleet*, as in the case before, and generally *remittitur* is in the roll, which proves nothing at all that therefore the Court thought he might not by law be enlarged;

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and besides, in both cases he stood committed also for disobeying an order in the Chancery." If the King and the Court of Chancery together committing, the commitment is void, because no cause for it is expressed on the warrant, it is not to be contended that when the House of Commons commits without cause assigned, the Courts of law have not power to discharge. But it is answered, the power and jurisdiction of the Court of Chancery was then in its infancy, and not yet confirmed. Now one of these cases was in *Hil. 12 Jac. 1.*; and it is curious, that only one year before, there was an inquiry and discussion of the powers of Chancery; and it is referred to *Ellesmere* and others to inquire of the relief given in the reign of *Henry the Seventh*, and they return, *1 Rep. in Chanc. ad calcem*, p. 12., that the judges themselves in their own courts, when there appeared to them matters of equity, because they by their oath and office could not stay the judgment, except it were some small time, had directed the parties to seek relief in Chancery; and that it had been done not only in the times of the several chancellors, but by the judges themselves, and that without any difficulty, while they sat in Chancery in the vacancy or absence of the Chancellor. Since then the Court of Chancery, in the reign of *Henry the Seventh*, had the power of granting injunctions against the proceedings of the Courts of *Westminster-hall*: what can more strongly prove their power? The Court will look, then, on the face of the warrants. If they saw there set out as a libel, that which, as lawyers, they thought purely innocent, the Court would not thereupon sanction the imprisonment of any *British* subject. Is it, then, for the House of Commons to profit by their own neglect in not setting out the libel? It is an attempt dexterously to exclude the authority of the judges of the land, which will not succeed.

Next, As to the second point, which is the main point in the cause, the breaking open the doors, The measure has

has been defended principally by analogy to, rather than on, the authority of *Semain's* case, and that, not as the case is related by Lord *Coke*, 5 *Rep.* 91., whose report has been studiously kept back, and has never been cited by the Defendant's counsel, but from the case of *Seyman v. Gresham*, Cro. Eliz. 508., because of an expression which has inadvertently crept into *Croke's* report; his words are, "And note, that *Williams* agreed with the opinion of *Yelverton* and *Fenner in omnibus*; and that the sheriff might not break any man's house to take execution, unless in the *Queen's* case, or for a contempt, &c." And the Court of King's Bench have proceeded mainly on this case, arguing by analogy, that if the sheriff may break open for a contempt, so may the officer of the House of Commons. It is rather a loose report, if a ground for so great a matter as the breaking open a house is included in an "&c." There are four reports of this case: one is Lord *Coke's*, who says, it was ruled, that for felony, or suspicion of felony, the King's officer may break the house to apprehend the felon; and that for two reasons; 1. for the commonwealth, for it is for the good of the commonwealth to apprehend felons; 2. in every felony the King hath interest, and where the King hath interest, the writ is, *non omittas propter aliquam libertatem*, and so the liberty or privilege of an house doth not hold against the King. It hath indeed been said, that the House of Commons hath the power to break the house, because it is for the commonwealth that it should have in such a case to break open a house; but in judgment of law that only is for the commonwealth which is done by the officers of the king, as head of the executive power. And as to that which is said by *Croke*, that *Williams* agreed with *Fenner* and *Yelverton in omnibus*, hear *Yelverton's* own report, p. 28. "unless it be on a *capias utlagatum*, which is the suit of the queen for the contempt of the party, it is

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not lawful for the sheriff to enter the house unless it be open, as the 18th of *Edw. 4.* is; which was granted by all the justices, contrary to the book 18 *Edw. 2.* *Execution. Moor, 668.* reports the case in nearly the same language as *Talverton*. The present case is not that of a process at the suit of the King, but of a subject; and the counsel for the Defendant has not read even the report in *Croke*, but only the note at the end: for in *Cro.* it is said, "but upon a *capias utlagatum* the sheriff may well enter any man's house to apprehend him; for no place ought to protect him against the queen; and he being out of the law, shall not have the protection of the law. *Maleverer v. Spinke, Dy. 35. b.* was cited: there the words are, "yet we may well agree that in some cases a man may justify a tort done; and this is in cases which sound for the common weal. As in time of war, a man may well justify building a fortification upon another man's land, without licence. Also one may justify pulling down a house which is on fire, for the safeguard of the houses of the neighbours; for these are cases of common weal. So it is, if a sheriff pursue a felon to a house, and, to take the felon, he breaks the door of the house; this is justifiable, because it is for the common weal that such felons should be taken." The notes to *Dyer* written by *Troby C. J.* are of equal authority with the text. A note, *ibid.* is, "By the common law no house may be broken open by the officer of the King at the suit of a common person, otherwise at the suit of the King; but now, by 21 *Jac. 1. c. 19. f. 8.*, concerning bankrupts, the commissioners may break open the house of another for the debt of the debtor; and if bankrupts convey their goods to their neighbour's house, the commissioners cannot, but the sheriff may, break open the house, because he is the sworn officer of the King. The commissioners may break open the booth or shop of another to get at the bankrupt's goods." Yet the words of the

the statute are general, giving power to break open, not only the trunks, chests, shops, and warehouses, but also the houses and chambers where the goods are or shall be reputed to be; yet, though the commissioners might break the booths and the shops, yet to break the house, the sheriff, who is the officer of the King, is necessary." And this, although the officer or officers are, by the words of the statute, to be appointed by the warrant of the commissioners under their hand and seal. It should seem that the warrant is to be directed to the sheriff, not to the messenger, or any other officer merely appointed by the commissioners of bankrupt; for the messenger cannot call out the *posse comitatus* in case of resistance. After diligent search, however, no instance appears of any warrant directed by the commissioners of bankrupt to any one to break open an house: but this case shews what the opinion of the judges of that time was, that by this statute the commissioners could not break a house without the help of the sworn officer of the king. *Briggs' case*, 1 *Ro. Rep.* 336. On an attachment against *Briggs*, *Coke* said that an attachment is a *non omittas* in itself, and that therefore the sheriff may break his house to take him; for the writ is for his person. In the same book, 112 and 194. are reports of proceedings against the same Defendant upon a *quo warranto* for a claim of a forest; and thence it is to be gathered, that the attachment was upon some offence against the forest laws, which were so severe, that under the writ *de homine replegiando*, the cases not bailable are, *de morte nominis*, and *de foresta nostrâ*. Seeing no more of the record than this, the fair conclusion is, that the attachment was for one of these excepted cases. Next, as to the employment of a military force: the plea states that it was a convenient way: it does not state that it was adopted on account of the refusal of the sheriff to call out the *posse comitatus*: the reason is left to conjecture.

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What right has the House of Commons to call out a military force? We must suppose that the Commander in Chief, and Secretary of State, have refused to send the military force, before the House of Commons could call out this force. Why have they not then committed the Commander in Chief and Secretary of State for a contempt? In 1784 the House of Commons passed a vote, that the minister had lost the confidence of the House. Suppose on his obstinately continuing in office they had voted him guilty of a contempt! If they had caught him in the House, the Serjeant at Arms might take him. If he had fortified himself in his own house, would any magistrate or officer of the crown have sent constables to take him? Would the Commander in Chief be guilty of a contempt for refusing to lend a military force for such a purpose? It may be admitted that where there is the right, there are the means of effecting it. If then the House has not the power of effecting it, that is a plain proof it has not the right. The late Mr. *Burke* says, "the House of Commons, as it was never instituted for the support of peace and subordination, is miserably appointed for that service, having no stronger weapon than its mace, nor any better officer than its serjeant at arms, whom it can command of its own proper authority." Next, as to the question of privilege, in the report of the case in the court below will be found every case that is of any authority; and there is no one instance in which either the House of Lords or the House of Commons hath committed for a libel, as for a contempt. And in the earlier times, until the reign of Henry the Eighth, the House of Commons never committed, even for actual obstructions, unless after petitioning either the King, or the House of Lords, and where the case had been afterwards referred back to themselves. In the judgment of the Court of King's Bench

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it is stated that there is a statutable recognition of this power, and two statutes are cited in support of the doctrine: the first is, that which was made by reason of *Strode's* case in 4 *Hen. 8. c. 8.*, in the Appendix of *Ruffhead's* statutes, *vol. 9. p. 115.* It was the case of imprisonment of a member in a dark dungeon under ground, where he was kept in irons, on bread and water, till he gave security for payment of a sum. There could not be a grosser breach of privilege; but the House do not vote it such; the legislature makes an act of parliament, making it for the first time a breach of privilege, and enact that the condemnation and execution shall be void: it is both a declaratory and enacting act; and it enacts, *f. 3*, that if any person be troubled contrary to that ordinance, he shall have *action on the case* against every such person or persons so vexing or troubling any, contrary to that ordinance. It furnishes this inference then. For so strong and gross a breach of privilege, the House does not punish the court of star-chambers, or person imprisoning; and only gives to the party injured, not for the present, but for any future injury, an action on the case. The act was done when parliament was not sitting; and so it was no obstruction of their proceedings; and so here, the libel of the Plaintiff being a censure on a past transaction of the House, was no obstruction of the proceedings of the House. The other statute is that of 1 *Jac. 1. c. 13.*, it is entitled, "an act for new executions to be sued against any which shall hereafter be delivered out of execution by privilege of parliament, and for discharge of them out of whose custody such persons shall be delivered." The concluding clause provides that "nothing therein contained shall extend to the diminishing of any punishment to be thereafter by censure of parliament inflicted upon any person which thereafter shall make or procure to be made any such arrest as is therein aforesaid." It is said this is a parliamentary recognition

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of the right of parliament to punish arrests. It is, indeed, a parliamentary recognition of the right of the House to prevent such arrests as therein are mentioned; but those are arrests made pending the sitting of parliament, which are actual obstructions. But an act reserving to the House one privilege in an especial case, where the privilege is absolutely necessary for carrying on the business of the country, is not a general recognition or declaration of the rights of parliament to punish in all such cases. These are the only statutes which have been cited as furnishing a legislative recognition of the alleged right. Next are to be considered the cases which are supposed to furnish authority as precedents. Postponing *Thorpe's* case, the first is the case of *Ferrers*, 1 *Hastell's Prec.* 53., who being a member of the House of Commons, and being arrested in *London*, the House sent their Serjeant at Arms to the *Compter*, to demand delivery of the prisoner, and an affray ensuing, and the Serjeant being repelled, his mace broken, and his servant beaten, the Lower House complained to the House of Peers, who judging the contempt to be very great, referred the punishment thereof to the order of the Commons House. They refused the writ which Lord Chancellor *Audley* offered them, they being of a clear opinion that all commandments and other acts proceeding from the nether House, were to be done and executed by their Serjeant without writ, only by shew of his mace, which was his warrant; and they sent their Serjeant to require the delivery of *Ferrers*, who was then given up, and on the following day the Sheriffs were sent to the *Tower*, and their officers to *Newgate*. This is the first attempt of the Lower House to vindicate their privileges by their own authority: but here it is to be observed, first, that they did not attempt it but by the authority of the House of Peers; next, that it is a case of a mixed

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mixed nature, and that *Ferrers* was entitled to his privilege as a servant of the King, even if he had not been a member of the House of Commons; thirdly, that it is punished as a contempt of the High Court of Parliament, consisting of the King, Lords, and Commons, as his Majesty states, in his address to both Houses. "And further we be informed by our judges, that we at no time stand so highly in our estate royal, as in the time of parliament, wherein we, as head, and you as members, are conjoined and knit together into one body politic, so as whatsoever offence or injury during that time is offered to the meanest member of the House, is to be judged as done against our person and the whole court of parliament; which prerogative of the court is so great, (as our learned counsel informeth us,) as all acts and processes coming out of any other inferior court, must for the time cease and give place to the highest." "Whereupon Sir *Edward Montagu*, then Lord Chief Justice, very gravely declared his opinion, confirming by divers reasons all that the King had said, which was assented to by all the residue, none speaking to the contrary." This, therefore, is of little weight as an authority that the House of Commons alone had power to commit. In *Hall's case*, 1 *Hats.* 92. 127., the House of Commons committed Mr. *Hall* to the *Tower* for six months, and until he should make retraction, and fined him 500 marks, and expelled him the House, for a libel, which was complained of, "not only as reproaching some particular good members of the House, but also very much slanderous and derogatory to the general authority, power, and state of that House, and prejudicial to the validity of its proceedings in making and establishing of laws. This was another mixed case. The offender published a book containing not only a slander on the proceedings of the House, but, as appears in page 127, containing the debates of the House. It was, to a late period,



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period, looked on as a clear contempt to publish the debates of the House. And as it now may be concluded from daily practice that it is no longer such, a commitment wherein that offence formed an ingredient, cannot be thought an authority for the present case. In 1691, the memorable year in which Lord *Coke* and Mr. *Selden* did so much for the constitution of the country, *Floyd's* case occurred, 1 *Commons Journ.* 598: and 9. 603. and 608. The House of Commons claimed a right to punish for libels generally, not for libels on their own proceedings only; and they passed judgment upon *Floyd* accordingly. This was the case of a libel on the Queen of Bohemia, the King's daughter; but the King, though the libel were on his daughter, did not approve the judgment; and by the Chancellor of the Exchequer, "thanking the zeal of the House, puts two queries: 1. Whether the extent and power of the House were to examine and punish offences not of members of the House, or general grievances. 2dly, To censure a denying party without accusation on oath." And it is curious to see the effect of this message on the mind of Sir *E. Coke*, who had expressed himself so strongly on the question; and the opinion of Attorney-General *Noy*, (who, according to Lord *Glarendon*, was a principal instrument in hurrying that Prince into the arbitrary measures that caused his destruction,) is thus expressed. "No doubt but in some cases this House may give judgment. In matters of returns, or concerning members of our House, or falling out in our view in parliament time; but, for foreign business, knoweth not how we can judge it; knoweth not but the matter of judicature remaineth above with the Lords; knoweth not that we have used to give judgment in any case but those before mentioned." Sir *E. Coke*, also says, "No question but this a House of record, and that it hath power of judicature in some cases. Have power to judge

judge of returns, and members of our House. We make a warrant to the great seal, therefore a power of record. One member offending out of the parliament, when he came hither and justified it, was censured for it. King's Bench, nor any other court, can judge in all cases." Here Sir *E. Coke* is maintaining exactly the doctrine which *Noy* stated, and which the Plaintiff in error now asserts; for he does not deny the authority of the House in matters there enumerated. The House of Lords afterwards decided the case, and inflicted a severe punishment, that the House of Commons might not seem to have gone further than the nature of the case required. In a case which occurred in 35 *Eliz.* there was a doubt of the manner in which a member of the House, who had been arrested, was to be relieved; and *Coke* said it was by warrant from the House of Commons to the Lord Chancellor, who thereon should issue a writ of *superseas*; and Lord *Coke* says, his hand shall not sign a warrant which his heart would not approve; and if he were to sign such an one, the Chancellor would enquire of it. This is extremely strong coming from Lord *Coke*, in the 35 *Eliz.* 1 *Hatfield*, p. 96. On 10th Feb. 1584 a motion was made touching the opinion of the House for privilege in case of a subpoena out of Chancery served on *Richard Coke* Esq., and a deputation thereon was sent to Sir *Thomas Bromley*, the Lord Chancellor, who answered, he thought the House had no such privilege against subpoenas as they pretended; neither would he allow of any precedent of this House committed unto them, formerly used in that behalf, unless this House could also prove the same to have been likewise thereupon allowed, and ratified also by the precedents in the Court of Chancery: search was directed to be made for precedents, but no report thereof appears to have been made. The extent of their privileges, therefore, was at that time a matter to

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be determined by the courts of law. In 1 *Hats*. 107. and 162. *Fitzherbert's* case, Sir *E. Coke* says, before a writ of privilege should be granted, "it would best suit the gravity of the House to grant a *habeas corpus cum causa*, returnable in Chancery, the sheriff to appear, and the whole matter being transmitted out of the Chancery, the House then to judge upon the whole record, by which means it would be no escape in the sheriff, nor would the party lose his action of debt, though *Fitzherbert* should be delivered." Therefore, even in the reign of Queen *Elizabeth*, when *Coke* was Speaker, and in that of *James* the First, when the King sent his message to the Commons, misliking their proceedings, these were the opinions of my Lord *Coke*, which it is proper should be seen before considering the 4 *Inst.* *Prynne* and *Selden* have proved that the *modus tenendi parliamentum in Anglia*, on which most of the first chapter of the 4 *Inst.* is founded, is a forgery. Therefore most of that treatise must fall. In the 4 *Inst.* 24., however, where Lord *Coke* speaks of the privilege of parliament, there is no instance of any exercise of the power of the House to commit for contempt: the cases of the master of the *Temple* and *Bogo de Clare*, there cited, are admitted by the Court of King's Bench to be in no wise applicable. The only applicable case is that of *Long*, who had bribed the mayor of *Wigbury* to return him, and the mayor was fined and imprisoned, and *Long* was removed, as Lord *Coke* says, 4 *Inst.* 23.; but his accuracy on this subject may be doubted, for a MS. note on this passage of Lord *Northington*, as good a constitutional lawyer as ever lived, is this: "Nota, though we find from the Journals that a pursuivant was sent for the mayor, yet we no where find he attended, or was imprisoned." Lord *Coke* says, p. 15., "It is *lex et consuetudo parliamenti*, that all weighty matters in any parliament moved concerning the Peers of the realm, or Commons in parliament assembled, ought to be determined, adjudged,

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adjudged, and discussed by the course of the parliament, and not by the civil law, nor yet by the common law of this realm, used by more inferior courts, which was so declared to be *secundum legem et consuetudinem parliamenti*, concerning the Peers of the realm, by the King and all the Lords Spiritual and Temporal; and the like, *pari ratione*, is for the Commons, for any thing done in the House of Commons; and the rather, for that by another law and custom of parliament, the King cannot take notice of any thing said or done in the House of Commons, but by the report of the House of Commons, and every member of the parliament hath a judicial place, and can be no witness. And this is the reason that Judges ought not to give any opinion of a matter of parliament, because it is not to be decided by the common laws, but *secundum legem et consuetudinem parliamenti*, and so the Judges in divers parliaments have confessed; and some hold that every offence committed in any court, punishable by that Court, must be punished, proceeding criminally, in the same court, or in some higher, and not in any inferior court; and the Court of Parliament hath no higher." It seems a necessary conclusion, not that the House of Commons hath this power, but that the power is with the entire Court of Parliament itself; and that where the usual course of the law is not sufficient, the Parliament may interfere and supply it. But the chief support of the doctrine maintained by the Defendant is *Thorpe's case. Rot. Parl. 1 H. 7. vol. 6. p. 294. and vol. 5. pp. 239. and 240. Hats. prec. 28. Thomas Thorpe*, who had been a Baron of the Exchequer, and Speaker of the House of Commons, was committed in execution at the suit of the *Duke of York*. In the 32d year of *Henry the Sixth*, on the 14th of February, the Commons present a petition to the King and Lords Spiritual and Temporal in parliament assembled, "that they may have and enjoy such liberties and privileges as they have been

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accustomed to, and have of old time used, for coming to parliament; and agreeably to those liberties and privileges, that *Thomas Thorpe*, their common Speaker, and *Walter Rayle*, members of the said parliament, then being in prison, may go at large and at liberty, for the well fulfilling of the said parliament." "Item, the 15th day of February it was opened and declared to the Lords spiritual and temporal, being in the Parliament Chamber, by the counsel of the *Duke of York*, that where *Thomas Thorpe*, in 36 H. 6. came to the place of the Bishop of *Durham*, and then and there took and bare away certain goods and chattels of the said Duke, against his will and license, and thereupon the same Duke came and took his action by bill in *Michaelmas* term then last, against the said *Thomas* in the Court of Exchequer, according to the privilege of the same court, (for so much as the said *Thomas* was one of the court, by which privilege he ought to be impleaded in that Court of Exchequer, in such cases, and in none other court,) to the which bill the said *Thomas* wilfully appeared, and had divers days to imparle at his request and desire, and to the said bill and action answered and pleaded not guilty; whereupon there was awarded in the said Exchequer a *venire facias* to the sheriff of *Middlesex*, returnable in the said Exchequer, and there, by the jury that passed between the said Duke and the said *Thomas*; it was found that the said *Thomas* was guilty of the trespasss contained in the said bill; and the said jury assessed the damages to the said Duke for the said trespasss to 1000*l.*, and for his costs 10*l.*; and thereupon judgment was given in the said Exchequer, and the said *Thomas*, according to the course of the law, was committed to the *Fleet* for the fine belonging to the King in that behalf: and thereupon it was prayed humbly of the behalf of the same Duke, that it should like their good Lordships, (considering that the trespasss was done

done and committed by the said *Thomas* since the beginning of this present parliament, and also the said bill and action were taken and come, and by process of law judgment thereon given against the said *Thomas* in time of vacation of the same parliament, and not in parliament time, and also that if the said *Thomas* should be released by privilege of parliament before the time that the said Duke should be satisfied of his said damages, and costs, the said Duke should be without remedy in that behalf,) that the said *Thomas*, according to the law, be kept in ward to the time that he have fully content and satisfied the said Duke of his full damages and costs. The said Lords Spiritual and Temporal, not intending to impeach or hurt the liberties and privileges of them that were come for the commune of this land to this present parliament, but equally, after the course of law, to minister justice, and to have knowledge what the law will weigh in that behalf, opened and declared to the justices the premises, and asked of them whether the said *Thomas* ought to be delivered from prison, by force and virtue of the privilege of parliament, or no. To the which question the Chief Justice, in the name of all the justices, after sad communication and mature deliberation had among them, answered, and said; “that they ought not to answer that question; for it hath not been used aforetime that the justices should in anywise determine the privilege of this High Court of Parliament; for it is so high and mighty in his nature, that it may make law, and, that is law, it may make no law; and the determination and knowledge of that privilege belongeth to the Lords of the Parliament, and not to the justices. But as for declaration of proceeding in the Lower Courts, in such case as writs of *superfedeas* of privilege of parliament be brought and delivered, the said Chief Justice said, that there be many and divers *superfedeas* of privilege of parliament brought into the courts,

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but there is no general *superfedeas* brought to surcease of all process; for if there should be, it should seem that the High Court of Parliament, which ministereth all justice and equity, should let the process of the common law, and so it should put the party complainant without remedy, for so much as actions at common law be not determined in this High Court of Parliament; and if any person that is a member of this High Court of Parliament be arrested, in such cases as be not for treason, or felony, or surety of the peace, or for a condemnation had before the Parliament, it is used that all such persons should be released of such arrests, and make an attorney, so that they may have their freedom and liberty freely to attend upon the Parliament. After which answer and declaration; it was thoroughly agreed, assented, and concluded by the Lords Spiritual and Temporal, that the said *Thomas*, according to the law, should remain still in prison for the causes aforesaid, the privilege of parliament, or that the same *Thomas* was Speaker of the Parliament, notwithstanding; and that the premises should be opened and declared to them that were come for the commune of this land, and that they should be charged and commanded in the King's name that they with all goodly haste and speed proceed to the election of another Speaker." It could not, however, have been the meaning of the Judges in this case that the House of Commons of itself could make and unmake law. In the same year 32 *H. 6.*, three days before this, the Duke of *York*, who had levied an army, had actually compelled the King to make him President of the Parliament, 5 *Rot. Parl.* 239. And on the third day of *April* following he was declared Protector by an act of parliament. The Duke was not content to have the opinion of the Judges as to the keeping *Thorpe* in prison only, but he also desired to have their opinion upon his own title to the crown. There was no difficulty to be solved,

solved, as it depended on the fact whether he descended from the eldest or the youngest sister; but the Judges not only gave no opinion upon it, but it was also referred to all the King's counsel and serjeants at law, who discovered that they knew as little of it. The King then proposed the question of the adverse claim, with an assurance that the answer should be of no detriment to them, but could get no opinion either from the Judges or the bar; and it was ultimately referred to the Lords, who in like manner decided nothing, but a compromise was made. This was in *February*; the battle of *Northampton* was in the *May* following, and the battle of *St. Albans*, where *Henry* the Sixth was taken prisoner, happened five years after. Under such circumstances little weight is due to such an authority. This and Lord *Shaftesbury's* case, however, were the chief foundations of the numerous cases of privilege since decided, as appears from the argument of Sir *Robert Atkins*, "On the power of dispensing with penal statutes," against the case of *non obstante's*, Sir *Edward Hale's* case, 2 *Sho.* 475., where, by all the Judges in the Exchequer Chamber, *non obstantes* were held valid, on the authority of *Henry* the Seventh having made a sheriff for life, *non obstante* the statute; and if that were bad, all the other superstructure must be bad. So is it here. *Thomas Thorpe* was taken prisoner fighting by the side of the King, at the battle of *Northampton*, and *Roger Thorpe* was taken in arms; and in an action of trespass brought against him by *Colt*, an adherent of the Duke's, judgment passed for 2000*l.* *Roger Thorpe* petitioned *Henry* the Seventh to be restored to his possessions, and it was granted. That petition, 6 *Rot. Parl.* 295. sets forth the nature of the trespass of *Thomas Thorpe*, the father. It states, that "the Duke of *York* by the excitation, stirring, and moving of one *Thomas Colt* Esq. being nigh of counsell with the said Duke,

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grievously maligned against the said *Thomas Thorpe* for the true and faithful service that he had done and owed to the said late King *Harry* the Sixth, and thereupon the said late Duke affirmed a bill of trespass against the said *Thomas Thorpe* in the Court of the King's Exchequer, supposing by the same bill, that the said *Thomas Thorpe* should have taken from the same Duke divers goods and chattels to the amount of 2000*l.*, where in truth the said *Thomas* never took no such goods of the said Duke; only by commandment of the said King *Harry*, the said *Thomas Thorpe* arrested certain harness, and other habiliments of war, of the said Duke's; for which action the said *Thomas Thorpe*, by special labour, and untrue means of the said *Thomas Colt*, was condemned to the said Duke, in 1010*l.*, by virtue of which condemnation, the said *Thomas Thorpe* was afterwards in the prison of the *Fleet*, and there kept unto the time he had fully contented and paid to the said Duke the said sum of 1010*l.*; and after that the said *Thomas Thorpe* was with the said King *Harry* the Sixth in his service, and by his command, at the field at *Northampton*, and there was taken prisoner, and in great jeopardy of his life, and from thence had first to the prison at *Newgate*, and after to the prison of the *Marshalsea*, and there kept in streight prison: and after, for the faithful service, truth, and allegiance that he owed and bare to the said late King *Harry*, was cruelly, contrary to all law and conscience, beheaded and put to death in *Haryngey Park*, in the county of *Middlesex*, and all his goods and chattels utterly taken, robbed, and spoiled from him by divers misruled persons, rebels to the said late King, in the time of great commotion and trouble had in this land, the said *Roger Thorpe* then being in service of the said late King out of this land, in the castle of *Guynez*, in the county of *Guynez*, in the marches of *Galeys*, in the company of

*Harry* then Duke of *Somerset*. The case, therefore; is this: the King commands the Chief Baron to seize the warlike array of the Duke in flagrant rebellion: he does it, and after the Duke has succeeded, he causes the Baron to be condemned to die for so doing. Such a case as this can never stand as an authority in a court of law. I shall touch on no other cases down to the time of the rebellion. Lord *Clarendon*, *Hist. Rebel.* vol. 1. 212. says, "After the act for the continuance of the parliament, the House of Commons took much more upon them in point of their privileges than they had done, and more undervalued the concurrence of the Peers; though that act neither added any thing to, nor extended their jurisdiction; which jurisdiction, the wisdom of former ages kept from being limited or defined; there being then no danger of excess; and it being much more agreeable to the nature of the supreme court to have an unlimited jurisdiction. But now that they could not be dissolved without their own consent, (the apprehension and fear whereof had always before kept them within some bounds of modesty,) they called any power they pleased to assume to themselves, "a branch of their privilege;" and any opposing or questioning of that power, "a breach of their privileges," which all men were bound to defend by their late protestation; and they were the only proper judges of their own privileges. Hereupon they called whom they pleased, "Delinquents," received complaints of all kinds, and committed to prison whom they pleased: which had never been done or attempted before this parliament; except in some apparent breach, as the arresting a privileged person, or the like." All privileges of all courts are the same. The courts of common law have no jurisdiction over an ecclesiastical court, or over a visitor; but if they exceed their jurisdiction, the courts of law will interfere; and will grant a prohibition: if

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the matter be within their jurisdiction, the courts of law will remand the cause to them. So here, the law enacts what are the privileges of parliament. This Court will examine, and if the matter be within the jurisdiction of the parliament, will send it back to them. And in another work, the answer to the *Leviathan* of *Hobbes*, Lord *Clarendon* says, of the pretended privileges of the Commons, "They were begotten in usurpations brought forth in treason, and nurtured in rebellion;" and it is rather a strange coincidence, that the House of Commons began first to command the King's forces to enforce their own orders, and went on, till they brought their King to the scaffold. There was never an instance, from that day hitherto, of any House of Commons using the power of commanding the military till the present instance; and though I do not insinuate that the present House of Commons are likely to act in that manner, yet if you acknowledge their right by law to command the King's troops, you will give them that force, which may be abused to the worst purposes, and which has never before been exerted, without bringing the sovereign to an untimely end. This case and Lord *Shaftesbury's*, 1 *Mod.* 144. are in no way parallel. *Rainsford* C. J. speaks of the mischievous consequence of retarding the business of parliament. The present case concerns a matter past, and can in nowise retard the business of parliament. But another circumstance is important; that was the case of a peer; if you imprison a peer, you deprive him alone of his privilege: but here the populous city of *Westminster* is deprived of its share in the representation for a whole sessions. The House of Commons had no right or power, to interrupt the due proceedings of parliament: they might have expelled the Plaintiff; and the city might have returned another: but the same reason, of not preventing the business of the parlia-

parliament, which operated against Lord *Shaftesbury's* discharge, is equally forcible against the Plaintiff's imprisonment. [*Graham B.* Does not that reason apply to every commitment of a member, however unquestionable?] In a less degree. Lord *Shaftesbury's* case, 1 *Mod.* 144., has often been cited, but never has it been examined, to see what was the ultimate result on the Journals. It occurred in 1677, 1 *Lords Journals*, 195. 15th *Feb.* 1676-7. A prorogation of parliament having been made for 15 months, he maintained that it was illegal, and that the parliament was dissolved. The Court of King's Bench refused to discharge him on *habeas corpus*, as we have seen; but within three years after, on the 13th of *November* 1680, there is the following entry in the Lord's Journals: "Whereas the Duke of *Buckingham*, Earls of *Salisbury* and *Shaftesbury*, and the Lord *Wharton*, were, contrary to the freedom of parliament, committed to prison by order of the Lords' House of the 15th of *February* 1676; whereupon followed a series of many unprecedented proceedings, derogatory to the authority of parliament, and of evil example and precedent to posterity; for vacating, making void, and destroying such precedents for ever, and in vindication of the authority and freedom of parliament, upon complaint hereof made, and due consideration and debate thereof by the Lords Spiritual and Temporal in parliament assembled, it is ordered, decreed, and adjudged, that the said order and proceedings concerning the said Lords were unparliamentary from the beginning, and in the whole progress thereof, and therefore are all ordered to be vacated (by virtue of this judgment,) in the journal books of this House, that the same, or any of them, may never be drawn into precedent for the future." If it be said, that may be the entry on the Lords' Journals, but look to the opinion of the Judges of the Court of King's Bench; the answer is, first,

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first, that at least the House of Lords thought they had no authority to commit him; and can that decision be good, which held that the Lords had a power, which they who acted, themselves held bad? But the argument is stronger here; for it would be curious to see the Court of Exchequer-chamber affirming a judgment of the Court of King's Bench, which is to go up to the Lords, who would say, "We are bound by the precedents of our forefathers on our own Journals, to say that these unparliamentary proceedings shall not be a precedent for the future." If this be so, it renders it unnecessary on behalf of the Plaintiff to observe on the cases of *Brass Crosby*, *Murray*, and *Oliver*. And it is remarkable, that the Court of Common Pleas, in the case of *Brass Crosby*, looked only into the law reports, and not into the Journals; for *De Grey C. J.* says, that Lord *Shaftesbury's* case was never complained of till 1704, whereas the Lords had thus annulled their own act in 1680. From that time to the Revolution there was no case of any consequence. The first after the Revolution was the case of the *Kentish* petition to the House of Commons, 13 *Com. Journals*, 518. May 8, 1701. That petition set forth "that the petitioners, deeply concerned at the dangerous state of this kingdom and of all *Europe*, considering that the fate of them and their posterity depended on the wisdom of their representatives in parliament, thought themselves bound in duty, humbly to lay before that Honourable House the consequence in that conjuncture of a speedy resolution and most sincere endeavour to answer the great trusts reposed in their said representatives by the country; and in regard that, from the experience of all ages, it was manifest no nation could be great or happy without union, they hoped no pretence whatsoever should be able to create a misunderstanding amongst themselves, or the least distrust of his Majesty, whose great actions for this nation

nation were writ in the hearts of his subjects, and could never, without the blackest ingratitude, be forgot: and praying that that House would have regard to the voice of the people; that their religion and safety might be effectually provided for, that the loyal addresses of that House might be turned into bills of supply, and that his Majesty might be enabled powerfully to assist his allies, before it were too late." The House resolved that the petition was scandalous, insolent, and seditious; tending to destroy the constitution of parliaments, and to subvert the established government of this realm; and committed ten persons concerned to the custody of the Serjeant at Arms. It is difficult to say in what part of the petition lay the libel; or what court in *Westminster-hall* could have been persuaded to adjudge it libellous. This transaction forms a strong contrast to the conduct of the House of Commons at a period very soon following, viz. in 1714, *Steele's* case, 17 *Com. Journ.* 513. 18th *March*, 1714, the question was put, that a printed pamphlet, intitled "*The Englishman*," being the close of the paper so called; and one other pamphlet intitled "*The Crisis*," written by *Richard Steele* Esq. a member of this House, are scandalous and seditious libels, containing many expressions highly reflecting upon her Majesty, and upon the nobility, gentry, clergy, and universities of this kingdom, maliciously insinuating that the Protestant succession in the house of *Hanover* is in danger under her Majesty's administration, and tending to alienate the affections of her Majesty's good subjects, and to create jealousies and divisions among them: and it was resolved that *Richard Steele* Esq., for his offence in writing and publishing the said scandalous and malicious libels, be expelled the House. The history of that transaction is singular. It happened near the close of the reign of *Queen Anne*, when party-spirit was at the highest. *Steele* was a known friend

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to the house of *Hanover*. In 1701 the Whigs were in power, but they were out of power in 1714. I shall read what was the language of that party in the House of Commons. They asked, Why was the author liable to censures in parliament for the things which he wrote in his private capacity; and if he is punishable by law, why is he not left to the law? By this mode of proceeding, parliament, which used to be the scourge only of evil ministers, is made by ministers the scourge of the public. *Life of Sir Robt. Walpole*, vol. 1. 71. It may in like manner be asked in this case, would it not have been better if the prosecution of this libel had been left to the courts of law? The very investigation obstructed the business of parliament. There were two other cases in the present reign. 29 *Com. Journ.* 675. 685. 30 *Lords Journ.* 414. and 420. 17th Nov. 1763. *Wilkes's case*. Complaint was made to the House of a printed paper, intitled "*An Essay on Woman*," with notes, to which the name of the Right Rev. Dr. *Warburton*, Lord Bishop of *Gloucester*, was affixed, in breach of the privilege of that House; and of another printed paper, intitled "*The Veni Creator paraphrased*:" and it was resolved that those printed papers, highly reflecting upon a member of that House, were a manifest breach of the privilege thereof, and were a most scandalous, obscene, and impious libel; a gross profanation of many parts of the Holy Scriptures, and a most wicked and blasphemous attempt to ridicule and vilify the person of our Blessed Saviour:" and having heard evidence that *Wilkes* was the author, the Lords ordered an address to his Majesty "that he would be graciously pleased to give the most effectual orders for the immediate prosecution of the author or authors of the said scandalous and impious libel, and for bringing them to condign punishment." But in that case, gross as the libel was, the Lords did not take upon themselves to commit the

the author as for a contempt. Yet there was no peculiar delicacy towards *Wilkes*. If ever there was a case in which the Houses of Parliament were determined against an individual, they were so against *Wilkes*. On the publication of the *North Briton*, No. 45., the Lords and Commons had a conference; and concurred to vote it a false, scandalous, and seditious libel, containing expressions of the most unexampled insolence and contumely towards his Majesty, the grossest aspersions upon both Houses of Parliament, and the most audacious defiance of the authority of the whole legislature, and most manifestly tending to alienate the affections of the people from his Majesty, to withdraw them from their obedience to the laws of the realm, and to excite them to traiterous insurrections against his Majesty's government; and resolved that it should be burnt by the hands of the common hangman, and that privilege of parliament did not extend to the case of writing and publishing seditious libels; nor ought to be allowed to obstruct the ordinary course of the laws in the speedy and effectual prosecution of so heinous and dangerous an offence." But what is the conduct of Parliament on this occasion? Both Houses surely have the power to commit for a libel if one hath! Yet what do they? They vote it a libel, and petition the King for a prosecution. In 29 *Com. Journ.* 723. and 32 *Com. Journ.* 178., 3 Feb. 9 G. 3. are votes of expulsion of *John Wilkes*; but the House does not even expel, until he is by law found guilty; and it is not till after he is sentenced to 22 months imprisonment, and is, emphatically, in execution of that judgment, that they expel him the House. If the necessity is urged of promptitude in executing, what are the present times compared with those in which *Wilkes's* case occurred? Then there were multitudes of seditious persons about the metropolis; it was the most inflamed period of this reign. There is another case, not in print:

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print: Sir *Gilbert Elliot*, now Lord *Minto*, had moved an impeachment against Sir *Elijah Impey*, and the motion occasioned numerous libels to be published: a motion was made that the authors be brought up and imprisoned; but the House left the matter to the common courts of law, and a person now in high authority, who soon after that time was made Speaker of the House of Commons, said, now that the Judges had commissions for life, and not *durante bene placito* of the Crown, the courts of law are the proper constitutional tribunal for judging offences against the privilege of parliament. Power is a sword, and privilege a shield; there is now no fear that in any question between the subject and the Crown the Judges of the land are susceptible of any bias. Privilege was lent to the House to shield the people from the power of the Crown, but the danger being removed which was the cause of that jealousy which the parliament entertained of the common law courts, the effect ought also to cease. He concluded by recapitulating the three questions which arose on the case, and inferred, 1st, That no such power was shewn to be given by the statute law: 2dly, That none such existed by prescription: 3dly, That it did not exist of necessity. That there was no instance in any book that the outer door can be broken by any party, unless in the name of the Crown; that it is not enough to say it is for the common weal to execute the Speaker's warrant, in order to justify the breaking the door; for it is conducive to the common weal that debts should be paid, yet it is not law that an outer door can be broken to enforce the payment of a debt; that the resolution of the House, and the vote made thereon, was therefore not in execution of the power they possessed; and that the warrant was not duly executed, because a warrant to the Serjeant at Arms ought to be executed by the Serjeant at Arms and his assistants only, and not by calling in the military

military to his assistance, and that this circumstance constituted a most important ingredient in the case. If he had not shewn the judgment of the Court below to be clearly wrong, at least he had shaken the authorities on which it was founded, and if the grounds of the judgment were not clearly established, the Court would decide in favour of the liberty of the subject.

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Richardson, for the Defendant, pursued, as the natural order of the argument, the course which had been adopted by the Court below. He complained that he was chiefly embarrassed by the concessions of the counsel for the Plaintiff, who admitted the right of the House to commit for breach of privilege in general, yet controverted it in cases of libel. If the House of Commons have the right to commit for breach of privilege, which is admitted, the question merely is, whether a libel can be a breach of privilege; for if it can, it is unquestioned that the House of Commons are to judge whether a particular libel be a breach of privilege or not. If persons were to come into the lobby, and obstruct the members of the House by positive force, it would be an unquestionable contempt. If they were to cover the walls of the House with placards calling on the people to obstruct the members, would not that be a breach of privilege? What if the libel be not prospective, but calling on the mob to take vengeance on the authors of particular votes since passed, is that no obstruction to their future proceedings? A libel, therefore, may be an immediate obstruction, or may tend to an obstruction, and the House must have the same protecting power to punish in the last case as in the first, and the House must judge of the degree in which the libel has this tendency. The argument of the counsel for the Plaintiff has been in great part directed to disprove his own concessions; for what other end are the instances cited wherein

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wherein the House of Commons has called on the House of Lords to aid or concur with them? Those, however, are not cases of libel, but cases in an early period of history, when the rights of parliament were much less clearly defined than now, and when it was necessary for all the branches of the legislature to concur to establish those rights, which tended to the general good. What else makes it necessary to revert to the supposed division of the two Houses in the 49th Hen. 3.? It is unnecessary to go back into an antiquarian research as to the origin of the present form of the House of Commons. *Selden* supposes that the introduction of the Commons to the share in the legislature which they have since obtained, was conferred on them by an act of parliament which is now lost. *Titles of Honour*, 737. 741. If it be supposed that the Houses separated within time of memory, it must be argued that the House of Commons hath no power to commit without producing an act of parliament; but it is admitted that they have the power to commit for a clear breach of privilege. There is no weight in the argument drawn from those cases where the House has not chosen to interfere in a summary mode; it is only an exercise of their discretion. The language of some members cited in Lord *Minto's* case, acknowledging the safety with which it may now be left to the Judges now independent of the Crown, to decide questions of privilege, is the strongest proof of the right of the House to commit. That right is exercised by the House of Commons, and recognized by them during the whole period which intervened between the reign of Queen *Elizabeth* and the present time. The committee, instructed by the House of Commons to enquire into this point, have found not less than forty instances. The judicial recognitions of the power are to be found most fully stated in 2 *State Tr.* 616. to 632., *Lord Shaftesbury's case*. S. C. 1 *Mod. Queen*

Queen v. Paty. 2 *Lord Raymond* 1105. *Murray's case*, 1 *Wils.* 299. *Crosby's case*, 3 *Wils.* 188., (although the last, indeed, was not a case of libel, but there is no distinction in that respect.) *Oliver's case* before the Court of Exchequer, not reported, which happened immediately after *Crosby's*; and *Flower's case*, 8 *T. R.* 314. Also the proceedings in the case of *Pemberton C. J.* and *T. Jones J.* 8 *St. Tr. p.* 3. Lord *Shaftebury's* case is a very decisive authority on the point. The House of Lords, in terms the most summary, voted that Lord *Shaftebury* had been guilty of high contempt committed against that House, and the warrant stated no more. It was determined, that though such a commitment for a contempt, not stating what it was, would have been insufficient for an inferior court, yet it sufficed for the House of Lords, because they were the judges of the question whether a contempt or not. *Transferat in rem judicatam.* The House of Lords had jurisdiction of the question of contempt, and had found it, and the Court of King's Bench could not try whether it were a contempt or not, which *Jones J.* particularly notes in his judgment. So the ground was, that when the House of Lords had actually adjudged the point, this Court could not enquire whether there had been a contempt or not. *Rainsford J.* says, it would be mischievous if this Court should deliver a member of the House of Peers and Commons who is committed, for thereby the business of parliament may be retarded, for it may be the commitment was for evil behaviour, or indecent reflections on other members, to the disturbance of affairs in parliament. *Twissden J.*, though absent, concurred. The event was, that Lord *Shaftebury*(a) apologized, and was liberated. The commitment in this case, as in that, is not for safe custody, but in execution. This is a strong

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(a) Lord *Shaftebury* abstained from retracting his opinion on the point of law.

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authority to shew that when one branch of the legislature has adjudged a case which lies within their own jurisdiction, a court of law cannot review it; and the subsequent proceedings of the House of Lords confirm this doctrine, for they shew that there is a constitutional tribunal to reverse any thing which is adjudged wrong by that body. To say otherwise, would be to argue that because a judgment is erroneous, and may be reversed on appeal, therefore a Court does wrong which notices the subsistence of the judgment while unrepealed. And it would be monstrous to say, an officer is liable to an action for carrying into execution the judgment of a competent court while it is in force; it even protects him after the judgment is reversed. 1 *Mod.* 119. and 184., *Busbell's case*. S. C. *Vaug.* 735. The Court declared (184.) their opinion against the action; viz. that no action will lie against a Judge for wrongful commitment, any more than for an erroneous judgment. If any redress were given in the present case, a *habeas corpus* would be the means of that redress; for it appears by *Busbell's case* a man may be liberated by *habeas corpus*, if improperly committed, though he cannot bring an action. In the case of *Jay v. Topham*, 8 *St. Tr.* 1., *Pemberton C. J.* and *T. Jones J.* at the bar of the House of Commons agreed that if the order of that House had been pleaded in bar, and not in abatement to the jurisdiction, it would have been good; and the judgment, it is conceived, was right, that it was no plea in abatement. On *Murray's case* it does not appear, either upon the report or on the warrant, what the contempt was; and the Court held that it need not appear; for if it did, they could not judge thereof. *Denison J.* says, the House needs not tell us what the contempt was, because we cannot judge of it; and *Foster J.* notices, that even *Holt C. J.*, who differed with the other Judges in *Albby v. White*, held the House might commit for a contempt "in the face of the House;" these words seem improperly

perly added by *Foster J.*; for Lord *Holt* does not use them, and his opinion is the more entitled to weight in favour of the House here, because in *Regina v. Paty, Holt C. J.* says, he had the misfortune to differ from all the other Judges. *Rex v. Grosby* was not a case of libel: he being lord mayor, and *Oliver* being an alderman, had committed the Messenger of the House of Commons for entering the city and executing process. It does not appear at all upon the report what the original warrant was, for the execution of which the messenger was committed, yet it was held to be a commitment for breach of privilege of the House. If it had been necessary to shew to the Court that it was a contempt of the House, much more must have been shewn on the return of the writ of *habeas corpus*; but the Court held it unnecessary to go into that. *Flower's* case was for a libel in the *Cambridge Intelligencer*, reflecting on the Bishop of *Llandaff*. It was by the House of Lords adjudged on debate, that *Flower* was guilty of a high breach of privilege of the House. Lord *Kenyon C. J.* without the least difficulty remanded the prisoner upon his return made to a writ of *habeas corpus*. He considered it as too long and too frequently decided, to be brought into dispute: it did not appear in the warrant, nor on the return, whether the paper were libellous or not; nor whether it were a libel on the Bishop in his conduct in the House or not. Even the Court of Chancery has committed for libel: would the Court of King's Bench grant a *habeas corpus* to try whether one of the concurrent courts of *Westminster-hall* had rightly decided? If they would not interfere by *habeas corpus*, much less would they interpose in the case of an action to be brought against the officer who executed the process. If the Court had ordered the Master to draw up a rule for commitment of a person for a contempt, can any action lie against him, or against the

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subordinate officer who executes the process? All the cases shew that it is unnecessary to set out the libel on the return of the warrant of commitment, that the Court may judge whether it be libellous. *Rex v. Wilkes*, 2 *Wils.* 158, 9. *Pratt* C. J. gives an express judgment that it is only necessary briefly to express the nature of the offence charged. Much more appears on the present pleadings than in any of the cases cited did appear. Unless, therefore, it can be established that a libel can in no case be a breach of privilege, this Court cannot inquire whether the particular paper were a libel or not. Many cases are found of commitments by the Court of King's Bench for libels, as contempts. About twelve such instances are collected by the Committee of the House of Commons upon that point. There are some instances in Chancery; one in 2 *Atk.* 469. for a libel on certain parties to a proceeding pending in the Court of Chancery, for their conduct in the cause; that was held to be a contempt of the Court. The Lord Chancellor says, notwithstanding this should be a libel, yet, unless it be a contempt of the Court, I have no consufance of it. *Ex parte Jones*, 13 *Ves.* 237. Lord *Erskine*, Chancellor, committed the author of a libel for a contempt. He says, Lord *Hardwicke* considered the persons concerned in the business of the court as under the protection of the Court. No more, therefore, is claimed for the House of Commons, than is claimed by all other Courts. They may commit for an obstruction: and, if a libel be an obstruction, they may commit for libel, and they are to judge whether it be an obstruction or not. They have in numerous instances exercised that power, and no case hitherto has held that they may not do so; and if so, they may still exercise it, and need not shew on their record, whether the paper be libel or not. There then remain only some very subordinate points, whether the outer doors may be broken, and whether it

was wrong to employ the force of the soldiery. As to the breaking of the doors, the case of *Semaine* is bot-
tomed in older cases. 13 *Ed. 4. 9 a. pl. 4.* "A question
arose concerning arrests, and it was holden that for
felony, or for suspicion of felony, a man may break a house
to take the felon; for it is for the interest of the com-
monweal to take them. And also *Choke* said that the
King hath an interest: the writ is *non omittas propter
aliquam libertatem, &c.*, so the liberty of his house shall
not protect him. But otherwise it is for debt or tref-
pafs: the sheriff or any other may not break the house,
because that is but for the particular interest of the
party." It is taking a very narrow view, to say a door
can be broken only at the suit of the Crown: the true
principle is, a distinction between a public interest and
an individual interest: for there, as *Choke C. J.* expresses
it, the King hath an interest. This law rests on the
ground that in common disputes between man and man,
it was of more importance to preserve a man's house,
than that the other party should receive his debt;
but in cases which are for the commonweal, (and
felony is used but for an instance,) the individual in-
terest must give way. That this is the principle appears
from the case of *Maleverer v. Spinke, Dy. 35.*, where it
is held that a man may pull down a house which is on
fire for the safety of the next houses; for these are
cases of the commonweal; yet that is not acting at the
command of the King. "So is it," says *Dyer*, "if the
sheriff pursues a felon into a house, and for taking the
felon he breaks the door of the house: this is jus-
tifiable." The principle is, that where the public, the
commonweal, have an interest, the private convenience
must give way. This is also the principle of *Semaine's*
case. And it appears by the report of that case in
Cro. El. that there had been a difference in opinion
whether a man shutting his door could defeat an exe-

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cution, or render him liable to an action for it; but afterwards they all concurred, and *Croke* says their concurrence was, that doors might be broken open in the Queen's case, or for a contempt. So in *Briggs's* case, it was held that a door may be broken for an attachment, for it is against his person. It does not appear on search at the Crown-office what the nature of the contempt committed by *Briggs* was, but two rules were made on the sheriff of *Salop* to return the attachment. [*Mansfield* C. J. and *Heath* J. observed that *Clifford's* conjecture certainly was very ingenious, but it was a mere conjecture; besides, how could the matter come into the Court of King's Bench? The forest laws were administered before the Chief Justice in *Eyre*. The Court of King's Bench did not at that time issue attachments for offences against the forest laws: it had no connection at that time with the forest laws. *Graham* B. observed, it was hardly to be conceived that the Court of King's Bench would issue an attachment but for some contempt of some part of their own process.] Before quitting this part of the subject, it is necessary to refer to *Ferrers's* case, upon which it has been broadly stated, that he derived his authority from the circumstance of his being a servant of the Crown, exercising the process of the Crown, not as an officer of the House of Commons. Although the Serjeants at Arms are appointed by the Crown, one to attend on the Lord Chancellor, and another to attend on the Speaker of the House of Commons, yet in the exercise of the process confided to him by the House, the Serjeant at Arms acts by the authority of the House. If commissioners of bankrupt issue a warrant to the sheriff, then he is their officer. [*Mansfield* C. J. Many commissioners of bankrupt perhaps hear me. I have no idea that any commissioners can compulsorily direct their process to the sheriff; they may direct it to him, indeed, as they may to any one,

if the sheriff chooses to execute it.] As to the employment of the soldiers, the only trace of it on the record, is, that certain soldiers and men armed with offensive weapons forcibly broke the window; is it meant to say that the process is vacated because a soldier was present? A soldier does not forfeit the rights of a citizen, he is equally competent to form a part of the *posse comitatus*, or to assist in executing process, as any other subject.

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Clifford, in reply, adopted the course of argument which *Richardson* had taken. If the counsel for the Defendant was embarrassed by the concessions which had been made on behalf of the Plaintiff, it was because he came prepared not to argue the simple question which was before the Court, but the abstract question, Whether the House of Commons may commit for any breach of privilege whatever. But the simple question is, Whether a libel on the past proceedings of the House of Commons is a breach of privilege. It was conceded by the Defendant that down to the reign of *Elizabeth* not a single instance had occurred where the House of Commons, without the aid of the Crown and the House of Lords, had ever committed for breach of privilege. It has been assumed for the Defendant, as if the Plaintiff had argued that if the first case of commitment was within time of memory, the power could not have been given otherwise than by statute. But the Plaintiff's argument was, that the right could exist only by one of three modes, statute, prescription, or necessity, to enable the House to preserve their own existence; and this last is a much stronger ground for them than either common law or statute. Yet in order to maintain the power on the last ground, it is said, a libel may be an obstruction, or may tend to an obstruction. When the counsel for the Defendant argued this,

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he felt he was on very tender ground; for he felt that the only right was that of removing an obstruction, or, in other words, abating a nuisance. But a libel can in no case be an obstruction. He puts the instance of persons filling the lobby of the House with placards, exciting to sedition: that would be an obstruction, but not consisting in the libel, but in the conduct of coming there; and when that was prevented, so as to be no obstruction, the House ought then to refer the written paper to the proper courts of law. It is said, the Courts of *Westminster-hall* would commit for a libel upon themselves. There are in the books only four cases, *Cro. Cha.* 175., *Jeffe's* case of a libel on *Coke* C. J., who left it to be punished by indictment; secondly, *Cro. Car.* 503.; *Harrison's* case, *S. C.* 131., the defendant was guilty of a libel on *Hutton* J. calling him a traitor in open court. The Court of Common Pleas, instead of committing him for a contempt^(a), left it to be punished by law; he was indicted, and *Hutton* J. also sued him by bill in the King's Bench. There have been two later cases, one of libel on Lord *Ellenborough* C. J. and another which on same day was in the House of Lords, of a libel on *Le Blanc* J. *Rex v. White*, 1 *Camp.* 359. If it be true that in every case of libel on Judges for past proceedings the Courts ought to commit, those learned persons would not have so far forgotten their duty as not to commit the offenders. To argue from the past practice of courts of justice is a good criterion of the law. On the other side, the argument has been confined solely to the practice of the House of Commons themselves. But on search from 1549 downwards, only 40 cases of commitment have been found, and if many cases are found in which the House has refused to commit, that is as strong evidence of the law on the one side, as the cases in which they have committed are

(a) *Crawley* J., who was in court, instantly committed him for a contempt. *Hutt.* 131.

on the other. On the question put in argument, whether the Court of King's Bench could not commit for such a contempt, answer was made by one of the Court, that it can hardly be conceived that the Court of King's Bench would commit but for a contempt of some part of their process. But merely speaking of a part of their process, and saying it is not such as it ought to be, is not such a contempt for which they would instantly commit; it must be a contempt which would amount to an obstruction. As to the cases of *Murray, Oliver,* and *Crosby*, they do not apply here. *Murray's* case was not only the case of an obstruction to an election, but of a contempt of the House of Commons, for he refused to place himself in that posture which, according to the then practice of the House, was required in all cases of censure on persons misbehaving in elections. On that occasion, the House finding they had no power of compelling him to conform, abolished the practice. The cases of *Oliver* and *Brass Crosby* do not apply: they were not for libel, but for committing to the *Poultry* the Messengers of the House of Commons, who came to apprehend the printer of the *North Briton*. *Flower's* case, 8 T. R. 314., was not cited on behalf of the Plaintiff, because it rested on the cases of *Rex v. Thorpe*, and *Rex v. Lord Shaftesbury*, which may be considered as demolished; and the only Judge in court, except Lord *Kenyon*, was *Grosé J.* who rested on a *dictum* of *De Grey C. J.* in *Crosby's* case, which has since been shewn to be founded in error. In 1677, the year after that in which Lord *Shaftesbury*, Lord *Wharton*, and the others were committed, and after the decision of the King's Bench that they were not entitled to be liberated on *habeas corpus*, an entry had been made on the Lord's Journals, that it was a breach of privilege in any Peer committed by that House to sue out a writ of *habeas corpus* in any inferior court: but in the following year the same Lords resolved that the resolutions

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of the former year, of which this was one, shall be wholly annulled. This is a declaration, therefore, by the House of Peers, that the Judges may interfere to liberate by *habeas corpus* persons committed for breach of privilege; and if the Court has the right, it is their duty to interfere, for the liberty of the subject. To come now to those which the counsel for the Defendant calls subordinate points. 1. Whether the House of Commons hath a right to break outer doors. 2dly, Whether they have the right to use the military. [*Mansfield C. J.* The last point cannot arise, because the plea states that the Defendant used no more force than was necessary and proper, and the Plaintiff by his demurrer admits that this was a convenient mode of entry: he might have put that in issue by a new assignment, which he has not done.] *Clifford* then confined himself to the first point, the breaking of the outer door, the justification of which rests on *Semaine's* case, and that case not cited from any principal reporter, but only from a note at the end of a case in *Croke*, which says, that the sheriff might not break any man's house unless in the Queen's case or for a contempt. It is not denied, that for some contempts the sheriff may break the house, but he may not for all. What is meant by " &c." ? That officers may break the house when they will? No; but that they may in such cases as there are mentioned of *capias utlagatum*. As to *Briggs' case*, it consists only of four lines, that he may be attached for a contempt; and that, not shewing what the contempt was. The Court will not, therefore, think it fit to establish a precedent never known to the wisdom of former times, if it be not necessary to the safety of the House of Commons. What is the necessity? If a man who has been contemptuous withdraws himself from the House, and locks himself up in his own house, he ceases to obstruct them, they may proceed and punish

punish him by law. Is it then by way of punishment? Neither the Court of King's Bench nor this Court hath power to inflict imprisonment during their pleasure, by way of punishment. The case is, that the House imprison an offender, merely to remove the nuisance, and liberate him so soon as the obstruction is effectually removed. This shews that they are not to commit for punishment. The counsel for the Defendant says, citing Lord *Camden*, 2 *Wils.* 159., the Court will not look at the libel, because though they might perhaps be able to determine that it was a libel, they could not judge that it was not a libel, because of innuendos, &c.; but that was said in a case of commitment for trial, wherein it is unnecessary to state the nature of the libel, any more than it is necessary to state the circumstances of the murder or felony on a commitment for trial for either of those offences. And the doctrine is not applicable to the case of commitment in execution. If the House of Commons had set out the libel *verbatim* on their commitment, and called that a libel which on the face of it appeared not to be such, the Court would hardly say that was a libel merely because the House had held it such, when their better judgment held it was not. If so, they will not let the House take advantage of their own concealment, and because they have not enabled the Court to say whether it is a libel or not, therefore pronounce that it must be a libel. Another point on which the counsel for the Defendant much dwelt, is the language of the warrant and order of the House. The words made use of in describing the offence, are "reflecting upon the just rights and privileges of this House." The word "reflecting" is as often used in a good, as a bad sense, and does not sufficiently designate the publication as a libel. *Johnson* in his dictionary has twenty-three examples of the meaning of the word reflecting, and two of them are *in bonam partem*; so that the

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the weight of authority is in favour of an innocent meaning. If one were to say, "reflecting on the unjust privileges of the House," the presumption would have been, that it was meant vituperatively; but if one were to say, "reflecting on the just privileges of the House," he most probably would be taken to mean, "reflecting with admiration and pleasure." In Lord *Shaftesbury's* case mention is made of indecent reflections on the House, disturbing their proceedings. An astronomer reflects on the stars, a lover on the beauties of his mistress, a pious man on the bounty of his Maker. The Court will not impute to the word in either of these cases *malum sensum*. If then the meaning of reflecting be ambiguous, the Court will not, deciding contrary to the liberty of the subject, adopt the malignant sense of it. There is only one ground, therefore, on which the Defendant's justification is to be now contended for, namely, that this power is a privilege necessarily inherent in the House of Commons, and necessary to their existence, and the good order of their proceedings. This necessity has not been proved to exist, therefore the decision must be such as is the most favourable to the liberty of the subject.

MANSFIELD C. J. This case has undergone a great discussion in the Court of King's Bench, and here, and as the cases are extremely well known, and as I suppose it is much wished for by the parties that judgment should be given as soon as possible, we have thought it better to give our judgment immediately. It will not be necessary for me to speak at any considerable length on the subject, but I must state the material part of the declaration, and the plea on which the Defendant depends. The declaration states that the Defendant on the 6th of April 1810 and on divers other times between that day and the exhibiting of this bill, broke and entered the house of

of the Plaintiff in *St. George's, Hanover Square*, and at one of the times, his outer door being fastened, with divers soldiers and men armed with offensive weapons, forcibly and with strong hands broke open a certain window and two window-shutters; and it proceeds to describe his mode of entering through the window, forcing the Plaintiff out of his house into a coach, carrying him through divers streets to the Tower, and there imprisoning him without any probable cause. The Defendant pleads, as to breaking and entering, and with the said soldiers and men breaking the window and window-shutters, and entering and making a great noise, and forcing him out of the house, and taking him to the Tower, and all the introductory trespasses, that the Parliament was sitting at *Westminster*, that the Plaintiff was a member of the House of Commons, and the Defendant a member and the Speaker of the said House, and they being so, it was resolved in the said House, that a letter signed "*Francis Burdett*" and a paper subjoined, intitled "*Arguments*," printed in *Cobbett's Weekly Register*, was a libellous and scandalous paper, reflecting on the just rights and privileges of that House; and that Sir *Francis Burdett*, who had admitted the above letter and argument to be printed by his authority, had been thereby guilty of a breach of the privileges of that House, and it was thereupon ordered by that House, that Sir *F. B.* be for his said offence committed, sent to the Tower of *London*; and that the Speaker do issue his warrants accordingly: that the Speaker thereupon made his warrant to the Serjeant at Arms, reciting therein the order of the House, setting it out, and therefore it was required that the Serjeant at Arms or his Deputy should take into his custody the body of the Plaintiff, and then forthwith deliver him over to the custody of the Lieutenant of the Tower of *London*; and that he delivered the warrant to *Francis John Colman Esq.*, the Serjeant at Arms

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Arms attending the House of Commons, to whom the warrant was directed, to be executed: that he further made his certain other warrant directed to the Lieutenant of the Tower of *London*, reciting the same facts as the former warrant, and requiring him to receive the body of the said *Sir F. Burdett*, and him safely keep during the pleasure of that House, and caused it to be delivered to the Lieutenant of the Tower to be executed, by virtue of which first-mentioned warrant *Colman*, the Serjeant at Arms, afterwards, in obedience to the said orders of the said House, went to the said messuage; and finding it shut and fastened, so that he could not enter, and that *Sir F. Burdett* was within, *Colman* audibly gave notice of his warrant, and required admittance; and because the outer door was not opened, and the Plaintiff in error refused to open it, the said *Colman*, with and by the aid of the said soldiers and men, broke the said window and window-shutters, and through the same broke into and entered the same messuage, the same being a convenient way of entering, and took the Plaintiff and forced him into his coach, and forced him along the streets, and delivered him to the Lieutenant of the Tower to be detained there, in obedience to the said order; and the Lieutenant received the Plaintiff, and detained him according to the said second warrant, and in so doing the said *Colman* necessarily made a little noise and disturbance, &c. To this plea there was a general demurrer, on which judgment for the Defendant has been given by the Court of King's Bench, and error is brought, and the general error is assigned, and the question is, whether that judgment is erroneous, or whether the pleas contain a sufficient justification of the facts charged in the declaration. Several points have been insisted on in support of the demurrer. The great point is, that the House of Commons has no authority to commit for a contempt, unless it be an obstruction of the

the proceedings of the House; that for a libel upon past transactions; which can be no obstruction, they cannot commit; and, indeed, that the House of Commons has no power to commit at all; because, till a certain period, for some reason or other, they consulted the House of Lords, and sometimes the King, before they exercised that power. To be sure it is a pretty extraordinary thing, to find out in the 19th century, that there is no foundation for a practice which has been sanctified by usage, as is admitted, ever since the reign of Queen *Elizabeth*. That which has never been doubted of for so many years must, I think, be presumed to have a legal foundation. As to what is said of the House of Commons formerly being part of the House of Lords, and the time of their separation from the Barons, very opposite opinions have prevailed, and it is not now, in the 19th century, for the Judges to rest on these things, they are fit only for antiquarians to exercise their talents on. But it is said, that they cannot commit for a contempt past: that I do not understand, for they cannot commit for a contempt future. It is impossible to say that a libel upon the House of Commons, or on a member of that House, may not be a contempt; but as to the proposition that they cannot commit for past proceedings, whether past five minutes, or five days, it is clear that until they are past, the House cannot commit for them. Upon these two points, therefore, we are of opinion with the Defendant in error, that there can be no doubt on them. Next, much is said of the warrant, that it does not set out what the libel was; but it states that it was a libellous paper, which must be taken to be a defamatory paper: but it is enough that the warrant states it to be for a contempt; that was enough, in the opinion of all the Judges except *Holt C. J.*, in *Asby v. White*, 2 *Ld. Ray.* 938.; that was the opinion of a very able predecessor of mine,

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De Grey C. J., in *Crosby's* case; and we are content to abide with it. As to saying that a libel on a past transaction is no obstruction, how can it be said, that if, day after day, men are to be held up to obloquy and contempt by daily publications for what passed the day before, it is not an obstruction of their proceedings? Some few men may have the firmness to stand up against the torrent of popular abuse, but the generality of men have not nerves enough to take part in a public debate if they are thus to be held up and reviled. But it is not merely the daily and actual performance of their duty, but in this country, and in every country where there is a popular legislature, or a body of hereditary nobles, it is of the utmost importance that they should be habitually looked up to by the people with reverence and respect, and if their conduct is to be reviled, and they are to be habitually exposed as objects of scorn and contempt, it is easy to see that neither House of Parliament could act with any effect, either as the supporters of the Crown, or as the defenders of the people; and that the constitution of the country must soon come to an end. For the purpose of preventing therefore these practices, and for securing the freedom of debate, and respect to their proceedings, it is highly necessary that the House of Commons should be endowed with the power of punishing for contempts. But with respect to the warrant, it is sufficient to say, that the House of Commons have ruled it to be a contempt, and the Judges of *Westminster-hall* are bound by that. If it were not so, the Courts could never go on; for if when one Court committed for a contempt, another Court could review and annul their proceedings, the Courts would be in perpetual war. I take no notice of the argument last urged for the Plaintiff in error on the meaning of the word "reflect," that it may be used in a good sense; it is difficult to conceive it to be used in that sense when

coupled with the words "libellous and scandalous." We are of opinion, therefore, that the warrant is sufficient. We come, therefore, to the last point, on the breaking of the door, and it is urged that the authorities are very few, but the country would be in a strange state if there had been many authorities on such a point, and if persons punishable for contempts had frequently retired and fortified themselves in their houses: among the few cases, however, which there are, *Semaine's* case is the great case, and we are of opinion, that in order to take a man in obedience to a warrant of the Speaker of the House of Commons, an outer door may be broken. This, and every contempt, includes a breach of the peace; an offence is committed against the public weal, and for all such offences outer doors may be broken. Contempts are expressly mentioned in the case of *Seyman v. Gresham, Cro. El.* With respect to the use of soldiers, on which the counsel for the Plaintiff in error dwelt largely in his former argument, I stopped him now, because if he had intended to rest on an excess of force, or on the circumstance of improper persons being employed, he should have newly assigned; but since much has been said about soldiers, I will correct a strange mistaken notion which has got abroad, that because men are soldiers they cease to be citizens; a soldier is gifted with all the rights of other citizens, and is bound to all the duties of other citizens, and he is as much bound to prevent a breach of the peace or a felony as any other citizen. In 1780 this mistake extended to an alarming degree; soldiers with arms in their hands stood by and saw felonies committed, houses burnt, and pulled down before their eyes, by persons whom they might lawfully have put to death, if they could not otherwise prevent them, without interfering; some because they had no commanding officer to give them the command, and some because

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there was no justice of the peace with them. It is the more extraordinary because formerly the *posse comitatus*, which was the strength to prevent felonies, must in a great proportion have consisted of military tenants, who held lands by the tenure of military service. If it is necessary for the purpose of the preventing mischief, or for the execution of the law, it is not only the right of soldiers, but it is their duty to exert themselves in assisting the execution of a legal process, or to prevent any crime or mischief being committed. It is therefore highly important that the mistake should be corrected which supposes that an *Englishman*, by taking upon him the additional character of a soldier, puts off any of the rights and duties of an *Englishman*. We are therefore of opinion that plea is sufficient, and that the judgment must be

Affirmed.

END OF EASTER TERM.

C A S E S

ARGUED AND DETERMINED

1812.

Courts of COMMON PLEAS,

AND

EXCHEQUER-CHAMBER,

IN

Trinity Term,

In the Fifty-second Year of the Reign of GEORGE III.

IN the *Easter* Vacation 1812 that great and eminent Judge Sir *Souldan Lawrence* Knt., whose declining health had for several terms compelled him most reluctantly to be absent from the Court, resigned the office of one of His Majesty's Justices of the Common Pleas :

And on the first day of this term Sir *Vicary Gibbs* Knt., late His Majesty's Attorney-General, was appointed one of His Majesty's Justices of the Common Pleas, in the room of Sir *Souldan Lawrence*, and being admitted to the degree of the Coif, gave rings, the motto whereof was

“ *Leges Juraque.* ”

And on the first day of *June* he took his seat in the Court.

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May 29.

ANONYMOUS.

The acknowledgment of the warrant of attorney for suffering a recovery must be before the return of the summons; and if not, it would be error.

SHEPHERD Serjt. moved that a recovery might now pass under the following circumstances: The writ of summons was returnable on the *octave* of the *Purification*, which was the 9th of *February*, and the acknowledgment of the warrant of attorney was taken the 10th of *February*.

MANSFIELD C. J. The parties are not to appear till after the writ of summons: and inasmuch as the appearance must be entered of the day of the return of the writ, it would be a contradiction in terms, that the warrant of attorney to appear should be acknowledged on a day after the day of the return, on which day the appearance is recorded.

HEATH J. If the recovery were permitted to pass, the indulgence would be useless, for the objection would be matter of error.

Shepherd took nothing by his motion.

May 30.

VINCENT v. HOLT.

A solicitor of the equity side of the Court of Exchequer is not entitled therefore to practise in the Court of Chancery; nor, if he does, can he maintain an action for the amount of his bill.

THIS was an action brought by a solicitor against his client, to recover the amount of his bill for business done for him in prosecuting and defending suits in the Court of Chancery; nor, if he does, can he maintain an action for the amount of his bill.

And *semble*, that a solicitor of that court cannot by consent in writing authorize a solicitor of the Court of Exchequer to practise there in his name.

suits,

suits, as well in the High Court of Chancery as in the Court of Exchequer; and upon the trial of the cause, at the sittings after *Michaelmas* term 1811, the Plaintiff recovered a verdict for the amount due for business done in the Court of Exchequer, with liberty to move to increase the verdict, by adding to it the sum due to him for the business done in the Court of Chancery, if the Court should be of opinion that he was entitled to recover it, under the circumstance, that he was not a solicitor of that court, although it was in evidence that he had been duly admitted as a solicitor in the Court of Exchequer, on the equity side. It did not appear upon the trial that he had the consent in writing of any solicitor of the Court of Chancery to practise there in his name; but no objection was raised at the trial upon the absence of such consent.

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Best Serjt. had accordingly, in *Hilary* term, obtained a rule *nisi* to increase the verdict, upon the ground which he urged, that a solicitor of the equity side of the Court of Exchequer is entitled to practise as a solicitor in the Court of Chancery, on the authority of *Meddowcroft v. Holbrook*, 1 *H. Bl.* 50., where the converse of the proposition had been recognized by this Court.

Shepherd and *Lens* Serjts. now shewed cause. By the stat. 2 *G. 2. c. 23. s. 10.* it is rendered lawful for any attorney, or any solicitor, admitted to practise in some one of the courts, and duly sworn, to practise in the name of an attorney of any other of the courts, with his consent in writing, but no such permission is given them to practise in the name of any other solicitor of another court of equity; and one reason why no great reliance is to be placed on the case cited, is, that the statute distinctly requires a consent in writing from the attorney in whose name the proceedings are carried on;

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nevertheless, in that case no evidence of any such consent appears to have been given or required. That case too depends on the distinction, that in the Court of Exchequer no proceedings are conducted in the name of the solicitor himself, but that every thing there is done in the name of the clerk in court, and that he is the responsible person: whereas in the Court of Chancery, all the proceedings are carried on in the name of the solicitor. The 27th section is also very material for the Defendant, which provides that this statute shall not extend to the examination, swearing, admission, or enrolment of the attornies or clerks of the offices of the King's remembrancer, treasurer's remembrancer, pipe, or office of pleas, in the Court of Exchequer at *Westminster* for the time being, but that they may practise in the Court of Exchequer, or may practise in any other of the courts of record, in the name and with the consent of some sworn attorney of such court, such consent to be in writing, and signed by such attorney, in such manner as they had usually been and might have done before that act; and that attornies and solicitors of the several other courts may practise and solicit in the said respective offices in such manner as theretofore had been done. But this section is equally silent with the former as to practising in the name of a solicitor of another court.

Best and *Vaughan* Scrjts., in support of the rule. The distinction taken is without foundation; for equally in the Court of Chancery, as in the Exchequer, does the solicitor practise in the name of the clerk in court. The present rule must prevail, unless the Court will overturn the case of *Meddowcroft v. Holbrook*: and such a decision will also carry with it this hardship, that the Defendant will immediately sue the Plaintiff to recover the penalty of 50*l.* for practising without being admitted, and

and the judgment in the present action will be conclusive against him in that.

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MANSFIELD C. J. The business in the Court of Chancery, as well as in the Exchequer, is, to a certain extent, done by a clerk in court : but if that made a difference, it would repeal entirely the first prohibitory clause of the statute, as to those two courts. I do not understand the case of *Meddowcroft v. Holbrook*, nor the reasons there given by Lord *Loughborough* : he says, “ the Plaintiff had been admitted and enrolled in Chancery ;” but he had not been admitted and enrolled a solicitor of that court in which he was then practising, and the first clause is express that he shall not practise in it unless he is so admitted. The case, too, assumes that the act regulating the practice of attorneys is a penal law ; but I cannot conceive why a law which has that object is a penal law.

CHAMBRE J. I believe the statute has been entirely neglected, and very little acted on. It requires a consent in writing, which is scarcely ever given. But the question is, whether the case or the statute shall be set aside.

Rule discharged.

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June 1.

BOWSFIELD v. TOWER.

SAME v. THORNTON and CORNELIUS, Bail of
TOWER.

If a Plaintiff accepts from the principal Defendant a *cognovit* whereby he gives him time for payment by instalments, he thereby discharges the bail, unless they are parties to the arrangement.

SHEPHERD Serjt. had in *Easter* term last obtained a rule *nisi* to set aside the proceedings against the bail in this cause, upon the ground that the Plaintiff had accepted a *cognovit* from the principal for paying the debt by instalments, and that he had thus given time to the principal, and had thereby discharged the bail.

The rule having been enlarged until this term, *Beß* and *Vaughan* Serjts. on a former day shewed cause against it. They urged that as the bail were no parties to the agreement, there was nothing in it which hindered them from rendering their principal at any moment they pleased. *Hodgson v. Nugent*, 5 T. R. 277., A *cognovit* was held to be no discharge of the bail. *Shakespear v. Phillips*, 8 *East*, 433., was a still stronger case; for there an act for discharging insolvent debtors passed after the bail were fixed, and the principal was discharged under it, when only five of the instalments were due, yet the bail were still held liable for the whole condemnation money. A *cognovit* is only a confession of judgment with a stay of execution; and it matters not to the bail how the judgment is obtained, whether by confession or otherwise: it is merely the same as if the Plaintiff, having obtained an adverse judgment, should give the principal a certain time to pay it in, which clearly would be no discharge of the bail.

Shepherd in support of the rule. If the bail had rendered the principal, under this agreement it would have been

been a breach of faith in the Plaintiff to have detained him, which in effect takes from the bail the power of rendering him. Nor, inasmuch as the bail are not privy to the agreement, can they ever know whether the Defendant is entitled to his discharge or not. The same principle is allowed in this court as to the bail, which is stated by *Heath J.* in the case of *Rex v. Sheriff of Surry*, in the cause of *Brewer v. Clark*, ante p. 159., as a discharge to the sheriff; that the Plaintiff has created a new modification of the debt, and has elected a different remedy against the principal. Even in the case of a bill of exchange, if the holder gives time to the acceptor, without giving notice to the drawer, he thereby discharges the drawer. For aught that appears in *Shakespear v. Phillips*, the bail may there have been parties to the *cognovit*; or perhaps the objection might not have occurred to the counsel in that case, since the only question there discussed was, whether the bail were liable for all the seven instalments, or for five or three of them only. In any case of guaranty, by bond or otherwise, if time is given to the principal the surety is discharged.

Best observed, that in the case of the *Sheriff of Surry*, *Chambre J.* had taken a distinction between the case of the sheriff and the case of bail.

The Court gave time to the parties to enquire concerning some similar cases, which, it was suggested, had recently been decided in the Court of King's Bench.

HEATH J. now reported, that the Judges of the Court of King's Bench declared that the practice there was now settled to be, that the bail were discharged by such a *cognovit*.

MANSFIELD C. J. If the Defendant had been surrendered after such a *cognovit*, the Court would discharge him.

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him. The purpose of all these proceedings is to secure the Plaintiff. But the Plaintiff has agreed to take the money in a different way, and therefore the bail are discharged.

HEATH J. It would be very extraordinary that if the Plaintiff parted with the power of taking the Defendant until default made in payment of the instalments, the power of taking him should still subsist in the bail: that power is entirely derived from, and dependent upon the power of the Plaintiff to take him.

CHAMBRE J. If the bail were to surrender the principal, they would be discharged in a circuitous way, for no doubt the Court would hold the principal entitled to his discharge. It does not appear that in the case of *Hodgson v. Nugent* the *cognovit* was for payment by instalments: without time given, it is not a discharge.

GIBBS J. I was of counsel in the cause in the Court of King's Bench in which it lately was ruled, that by giving a *cognovit* payable by instalments, the bail were discharged, by analogy to the cases where a creditor, by giving time to the principal, discharges the surety. The bail cannot render the principal, if the Plaintiff gives the Defendant time for payment by instalments, until the time when failure is made in payment of an instalment. The bail, therefore, are put in a different situation from that in which they placed themselves when they entered into their recognizance.

Rule absolute for setting aside the proceedings, and entering an *exoneretur* on the bailpiece, the bail undertaking to bring no action. (a)

(a) See *Thomas v. Young and Jogget*, bail of *Grasam*. E. T. 1812. 25 *Engl.* 617.

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DOE, on the Demise of HILL, v. LEE.

June 1.

CLAYTON Serjt. moved to set aside a verdict which had been obtained by the Plaintiff in an action for mesne profits under the following circumstances: the Defendant in an ejectment had suffered judgment by default, after which the Plaintiff had accepted rent for the time past under an agreement to waive the costs of the ejectment, but he nevertheless brought an action for mesne profits to recover those costs, to which the Defendant pleaded the general issue; and upon the trial the Defendant offered evidence of the above mentioned agreement, which was rejected, and, as the Court now held, rightly rejected on that issue; for the defence was, in substance, that a part of the damages had been accepted in satisfaction for the whole: whereas the plea was, that no trespass had been committed; and they refused the rule.

In trespass for mesne profits, upon a plea of the general issue, evidence is not admissible that the Plaintiff had accepted the rent of the premises for the time in dispute, and had agreed to waive the costs of the ejectment.

ORGILL v. KEMSHEAD.

June 2.

MARSHALL Serjt. had obtained a rule nisi for leave to plead several matters to an action of covenant for non-payment of rent. The pleas suggested were, 1st. *Non est factum*. 2dly, No rent in arrear. 3dly, To the first and second counts, that the Defendant had, before the rent became due, assigned the premises to *Joshua Robinson*, who had tendered the rent. 4thly, To the third and fourth counts, that the Defendant, before the rent became due, assigned to *Joshua Robinson*, who

The pleas of *non est factum* and tender are inconsistent, and cannot be pleaded together.

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who assigned to *J. S.* who tendered the rent; and 9thly, a tender of all the rent by the Defendant.

Lens Serjt. now shewed cause against this rule, and cited the cases of *Fox v. Chandler*, 2 *W. Bl.* 905., and *Jenkins v. Edwards*, 5 *Term Rep.* 97.

Marshall, *contra*, in support of the rule, contended that it was the continual practice to plead *non est factum* with repugnant pleas. Two different full defences can hardly be pleaded which are not repugnant.

Mansfield C. J. The pleas are clearly repugnant: if the Defendant assigned a lease, it must have existed: and if the Defendant tendered rent, it was not rent which had never become due.

The Court made the rule absolute to plead the other pleas, striking out the *non est factum*.

June 2.

COWLEY v. BUSSELL.

The grantor of an annuity who is discharged out of custody under the insolvent act 51 *G. 3. c. 125.* is discharged both as to his person and property from all future payments of the annuity; but the act is no discharge of his sureties, or of specific securities.

THE Defendant, who had been discharged under the Insolvent Act 51 *Geo. 3. c. 125.*, had been arrested since his discharge for the arrears of an annuity which had become due since the 1st of May 1811, and *Onslow* Serjt. had obtained a rule to discharge him out of custody under the 29th section of the above act, which enacts, "That no person entitled to the benefit of that act, shall at any time thereafter be imprisoned by reason of any judgment or decree obtained for payment of money only, or for any debt, bond, damages, contempts for non-payment of money, costs, sum or sums of money

money contracted, incurred, occasioned, owing, or growing due before the first day of *May* one thousand eight hundred and eleven," and gives power to the Court, a Judge, or two justices of the peace, to discharge with costs, upon entering a common appearance; and by the 16th section of the same act, it is provided, "That all and every creditor and creditors of any debtor who shall be discharged by virtue of that act, for any sum or sums of money payable by way of annuity or otherwise at any future time or times by virtue of any bond, covenants, or other securities of any nature whatever, may be and shall be entitled to be admitted creditor or creditors, and shall be entitled to receive a dividend or dividends of the estate of such debtor, in such manner, and upon such terms and conditions as such creditor or creditors would have been entitled unto by the laws now in force, if such debtor had become bankrupt, and without prejudice in future to their respective securities, otherwise than as the same would have been affected by a proof made in respect thereof by the creditor under a commission of bankrupt and a certificate obtained by the bankrupt under such commission." By the 49 *Geo. 3. c. 121. sec. 17.* "it shall be competent to any annuity creditor of any person against whom a commission of bankrupt shall issue after the passing of that act, whether the same shall be secured by bond or covenant, or bond and covenant, or by whatever assurance or assurances the same shall be secured, and whether there shall or shall not be, or have been, any arrears of such annuity at or before the time of the bankruptcy, to prove under such commission as a creditor for the value of such annuity, which value the commissioners shall have power, and are thereby required to ascertain, and the certificate of every bankrupt under whose commission such proof shall be or might have been made, shall be a discharge of such bankrupt against

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against all demands whatever in respect of such annuity, and the arrears and future payments thereof, in the same manner as such certificate would discharge the bankrupt with respect to any other debt, proved, or which might have been proved, under the commission."

Vaughan Serjt. in shewing cause against the rule, did not contend for any right to hold the Defendant in execution for any arrears due before 1st May 1811, but stated the question to be, whether the Plaintiff's remedy for the arrears which had since accrued, was gone? Before the 49 G. 3. an annuity debtor could not use his certificate as a bar to an annuity secured by bond, unless there were arrears of the annuity, in which case he might value the bond: nor could he, in the case of an annuity secured by covenant, bar any more than the arrears which had become due, and not those afterwards to accrue: but by the above act of the 49 G. 3. the arrears of an annuity are put upon the same footing as any other debt: and the arrears are so far extinguished, as that the Defendant might be discharged out of custody; but by the words of the 16th section of the insolvent act of the 51 G. 3., that all annuity creditors "of any debtor who shall be discharged by that act shall be entitled to be admitted creditors without prejudice to their respective securities," it seems that the securities for the annuity were intended to have some subsequent operation, or otherwise those words would have been unnecessary; they are farther explained by the 29th section which limits the operation of the act to such debts as were growing due before the 1st of May 1811, since which time, the arrears for which the Defendant is now in custody, have become due. The question therefore is, whether the act does not leave to the Plaintiff the power of holding the Defendant in custody for a debt accrued since the 1st of May 1811.

MANSFIELD C. J. The words "without prejudice to their respective securities" are very obscure, but they may mean that if a man has any specific security on land, it should not be taken from him, or if he has sureties, that they should not be discharged; that only the person and property of the debtor are to be discharged in this case, in like manner as the person and property of the debtor only are discharged under a commission of bankruptcy. I can put no other sense on the clause than that the Defendant is to be discharged.

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CHAMBER J. I think upon the whole, the intention of the statute is to extinguish the debt as to the principal creditor, although that intention is most imperfectly expressed, and it is not at all happily elucidated by the reference to the numerous bankrupt laws. There is no provision made by this act for ascertaining the value of the annuities, as there is in the bankruptcy statutes; and I cannot venture to say that the commissioners are to take on them at their own risk, to set a value on the annuities; nor could they adopt the calculations to be made *ex parte* by any eminent calculator, without rendering themselves subject to incessant litigation.

GIBBS J. Before the act of the 49 G. 3. if any annuity was secured by bond, and the bond was forfeited, it might be proved under the commission, and the annuity became extinct: but if it were secured by covenant or bond and covenant, though the bond, if forfeited, were proved under the commission, still the creditor might proceed on the covenant after the bankrupt had obtained his certificate: this remedy upon the covenant was taken away by the stat. 49 G. 3., and it is that to which the present act alludes.

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As this was a new case, and no express notice of the Defendant's former discharge under the insolvent act had been served on the Plaintiff, the Court made the

Rule absolute without costs.

June 3.

JONES v. BROOKE.

In an action against the acceptor of a bill, accepted for the accommodation of the drawer, the drawer is not a competent witness to prove that the holder came to the bill on usurious consideration; because he does not stand indifferently liable to the holder and the acceptor: for the holder can recover against him only the contents of the bill; the acceptor is entitled to recover against him both the amount of the bill, and also, all damages he may have sustained, including the costs of the action against himself.

THIS was an action upon a bill of exchange drawn on the 1st of July 1807, by *J. R. Leaming* upon the Defendant at three months after date, for 25¼ 12s. payable to the drawer's own order, accepted by the Defendant, and by the drawer indorsed to the Plaintiff. Upon the trial of this cause at the sittings in *Middlesex*, after *Easter* term, 1808, before *Mansfield* C. J., the defence was, that the Defendant had accepted the bill for the accommodation of the drawer, who had discounted it with a person named *Reeves*, taking the amount in goods, which were much over-charged in price; that *Reeves* had held the bill until long after it became due, since which time he had demanded payment of it, and had subsequently indorsed it over to the Plaintiff. To prove the usurious interest, the Defendant called the wife of the drawer. *Shepherd* Serjt. for the Plaintiff, objected that the witness was called to get rid of the drawer's own responsibility to the acceptor, who having received from him no consideration for his acceptance, would, if he paid the bill, have an action against *Leaming* for the amount, as money paid to his use; and therefore, unless the Defendant should previously release him, the witness was incompetent. *Mansfield* C. J. reluctantly received the evidence. *Shepherd* in this term obtained, upon the ground

ground that the witness might not to have been admitted, a rule nisi to set aside the verdict; and enter a verdict for the Plaintiff.

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Best and Poll Serjts. in the same term, shewed cause against this rule. This case is decided by the authority of *Jordaine v. Lashbrook*, 7 T. R. 601, since which the rule no longer prevails that a person cannot be called to invalidate an instrument to which he has set his name. Secondly, the witness was admissible, because the drawer stands indifferent to the event of the suit: for if the Defendant succeeds, the drawer is liable to an action by the holder, since the verdict obtained upon his own evidence in this action cannot protect him in that; if the Plaintiff succeeds, then the drawer is liable to an action by the acceptor, who without consideration accepted the bill for the drawer's benefit. In the action by the holder against the witness, it would only be necessary to prove that he drew the bill, that it was presented for payment, and was not paid. It would be unnecessary to prove notice of the dishonour, because it is admitted that it was an accommodation-bill; and the present Defendant would be a competent witness to prove that he held no assets, *Staples v. Oknes*, 1 Esp. 332. The motives that operated on the mind of the acceptor not to pay the bill, could not be admissible in evidence in the case. The witness could not then be heard to disprove out of his own mouth the legality of the consideration; but his admission now given that this was an accommodation-bill, might then be used against him to dispense with the necessity of notice of the dishonour of the bill by the acceptor. They also referred to *Ilderton v. Atkinson*, 7 T. R. 480, *Evans v. Williams*, *ibid.* 481. *Birt v. Kershaw*, 2 East 458. *Bickerdike v. Bollman*, 1 T. R. 405, and *Rich v. Toppins*, Peake N. P. 224. S. C. 1 Esp. 177. The circumstance of the release in the last

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case made no difference. *Buckler v. Tomhard*, 5 T. R. 579. was decided, they said, upon its own particular circumstances, and was distinguishable from this. It was held in *Birt v. Kershaw*, that the additional obligation on the witness to pay the cost of the action against the acceptor, did not destroy the equilibrium of interest in the event.

Shepherd and *Vaughan* Serjts., in support of the rule, did not attempt to combat the doctrine laid down in *Jordaine v. Lasbrooke*; but contended that the witness here did not stand in a state of indifference. He had, they said, an immediate and direct interest to defeat the action against the acceptor, to whom he would be liable, not only for the amount of the bill, but for the costs of the present action; for which the acceptor might recover in a special count; whereas it was hazardous and uncertain whether the holder, if he failed against the acceptor, might ever succeed in the action against the drawer. This objection has not been overruled, but it has never before been taken, either in *Ilderton v. Atkinson*, or any of the other cases of that class. *Shepherd* mentioned a MS. case of *Carter v. Heppel*, in which he was engaged with Mr. *Bearcroft*, and which was one of the first causes wherein Lord *Kenyon* C. J. received the drawer of a bill as a witness in an action on the bill; two objections were made, the first, as in *Walton v. Shelly*, 1 T. R. 296, that the witness was not competent to impeach the instrument to which he had set his name: the second, that he was an interested witness. A new trial was granted, and on the second trial a release was given, and he had ever thought, that that was the right practice. The drawer does not stand indifferent in this case, for another reason, that he could never set up the usury committed by the first indorsee as a defence against the acceptor; his only possible answer would be, payment: but if the action is brought against the drawer

by the holder, the drawer may avail himself of the usury. This differs the case from that of principal and surety. [Mansfield C. J. observed that in *Blit* and *Kershaw* it was held that the acceptor might recover his costs as well as the contents of the bill, and that was the only case in which that distinction had been noticed.] The case of *Buckland v. Tankard* was in point with the present case, where it was held by Lord Kenyon, that the witness was properly rejected, because his situation would be bettered by the event of the verdict, inasmuch as, if the Plaintiff should succeed, the witness would be put to much greater difficulties to get back his money, than if the Plaintiff should be foiled through his testimony; and that reasoning is very applicable to the present case. *Dingwall v. Dunster*, 1 Doug. 247. The acceptor may be sued at any time, unless he has been expressly discharged. *Whittenbury v. Jackson* cited in *Walton v. Shelley*, 1 T. R. 298, is also in point, where a witness who had indorsed an accommodation-note of the Defendant's testator to the Plaintiffs, being called to prove that he had satisfied the note to the Plaintiffs, was rejected by Buller J. because he was the indorser. The witness is strongly interested in giving the testimony for which he is called.

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Best replied that *Dingwall v. Dunster* was mainly decided on the same ground as *Walton v. Shelley*, which had since been overruled by *Jordaine v. Lasbrooke*.

Cur. adv. vult.

MANSFIELD C. J. in this term delivered the judgment of the Court. This action is brought against Brooks as the acceptor of a bill of exchange; at the trial, the defence made, was, that this bill was given by the drawer to the indorser on usurious consideration, the latter having taken usurious interest on discounting the bill; and that the bill was accepted for the accommodation of

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the drawer. An objection was taken to the witness, who was the wife of the drawer; and the objection was overruled, on the ground that it is now the practice to receive persons whose names are on bills of exchange, as witnesses to impeach such bills. And so it is; but here the question is, inasmuch as this was an action against the acceptor, whether she could be received as against the acceptor; the drawer, as it was contended, being interested to defeat the action: the doubt was this; the drawer has an interest to protect the acceptor; for if the holder succeeds against the acceptor, the acceptor will have a right, against the drawer, to make the drawer pay, not only the money, but also all damages he the acceptor may sustain by being sued for it; for the drawer of an accommodation-bill is bound to indemnify the acceptor against the consequences of an acceptance made for the accommodation of the drawer: we are therefore of opinion that the drawer cannot be a witness, and consequently the rule must be made absolute for entering a

Verdict for the Plaintiff.

June 3.

BURGESS v. MERRILL.

If one of two partners is an infant, the holder of a bill accepted by both partners may declare on it as accepted by the adult only in the names of both; and if the Defendant pleads in abatement that the other partner ought also to be sued, the Plaintiff

MANSFIELD C. J. This is an action brought by the Plaintiff against the Defendant *Merrill* on a bill of exchange. The declaration states, that one *John Gibbs*, according to the custom of merchants, made a bill of exchange, and directed it to the Defendant, under the name of Mess. *Merrill and Le Blond*, and that the Defendant accepted the bill, under the name of *Merrill and Le Blond*. The Defendant pleaded in abatement, that the promises, if made, were made by the

may reply his infancy, and it is no departure.

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Defendant and *Robert Le Blond* jointly, and not by the Defendant solely; and that *R. Le Blond* is still alive. The Plaintiff replied that *R. Le Blond* was an infant; and the Defendant demurred to the replication, and the demurrer was argued. The same cause once came before us in another shape, (a) and many cases were cited on the doctrine, (which I never could understand,) that the contracts of infants were voidable only, and not void; and it was given in evidence that *Le Blond* had not avoided it. The cases are not intelligible, nor reconcilable to common sense. It is said in some of the cases, the infant may avoid the contract by pleading; that is, he pleads it is not his contract. Now how is that a contract, which does not bind a man? it is inseparable from the idea of a contract, that it should be binding. There is a famous case in 2 *Str.* 938. *Holt v. Ward Charencieux*, wherein the consideration of a promise of marriage was a promise to marry made by an infant. The distinction laid down is intelligible enough, that the infant may confirm contracts which are for his own benefit. But all that doctrine does not apply here. If an infant forms a partnership with an adult, he holds himself forth to the world as not being an infant; he practises a fraud on the world; and it does not lie in the mouth, as the phrase is, of an adult, who combines with him in practising this fraud, to avoid his own contract by saying his partner is an infant, and incompetent to make a contract. It is an extremely familiar doctrine, resulting upon all deeds and instruments, that they operate to form a contract according to their legal effect; this, therefore, is a binding contract as to the adult, though void as to the infant. And it is extremely proper to say, that the Plaintiff may safely overlook the privity of the infant, as to whom the con-

(a) See *Gibbs v. Merrill*, ante, vol. 3. 307.

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tract is nugatory, and may describe it as a contract made by the adult contractor only. No cases are found decided by the Courts, upon consideration, on this point. But in a case in 3 *Esp.* 76., *Chandler v. Parks and Danks*, where the plea pleaded was the general issue by *Parkes*, and infancy by *Danks*, the Plaintiff entered a *nolle prosequi* as to *Parkes*, and continued his action as to *Danks*. Lord *Kenyon* C. J. said the Plaintiff should have discontinued, and newly sued *Parkes*, and nonsuited him. Lord *Ellenborough* C. J. has followed the same doctrine, that the Plaintiff having declared on a joint contract, could not convert it to a sole contract by discontinuing against one of the contractors, but that he ought to have declared on it as a sole contract from the beginning. We are of opinion, therefore, that the demurrer must be overruled, and that judgment must be for the Plaintiff, and that the action is well brought against the adult only.

Judgment for the Plaintiff.

June 3.

BLOXAM Knt. v. BROWN.

Upon suggestion that a rule for a special jury has been obtained for the purpose of delay, the Court would not discharge the rule, but directed the cause to be tried by a special jury within the term.

It is discretionary in the Court to grant or to continue a rule for a special jury.

S*SHEPHERD* Serjt. had on a former day obtained on behalf of the Plaintiff a rule *nisi* for setting aside a rule which the Defendant had obtained for a special jury, upon a suggestion that the special jury was moved for only for the purpose of delay: the cause, which was an action upon a bill of exchange, stood in due course to be tried within the term, if not prevented by the special jury.

Best Serjt. shewed cause against the rule. He contended, first, that the words of the statute 3 G. 2. c. 25.

f. 15.

f. 15., which are, that "the Courts are respectively authorized and required, upon motion of any plaintiff or plaintiffs, to order and appoint a jury to be struck," &c. were imperative on the Courts to grant a special jury whenever it was moved for, leaving them no discretion.

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MANSFIELD C. J. The Courts are to issue all writs: it is their duty: but if their process is abused, they can interfere to set it aside, or rectify the abuse.

GIBBS J. It would be quite useless to move the Court for a special jury if it were a matter of right: it is required by the statute to be done upon motion; if the Court may not deny it, it would be unnecessary to ask their leave.

Best then contended on the merits, that as the Defendant had sworn last, and had sworn he believed this was a fit case to be tried by a special jury, he was entitled to maintain his rule, and no particular circumstances appeared to require that the Defendant should give judgment of the term, (which the Plaintiff prayed for,) in this case, more than in any other.

Shepherd, in support of his rule, insisted that the Defendant ought to have stated in his affidavit, circumstances from which the Court might judge whether this were a fit case for the exercise of their discretion in granting a special jury, which he had not done. It appeared by the Plaintiff's affidavit, that the Defendant had admitted his liability to pay the bill, but that it was not convenient to him at that time. He therefore prayed for judgment of the term, if the special jury should stand.

MANSFIELD C. J. declared that if a special jury could be struck, he would try the cause within the term. He

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added that these motions to discharge rules for special juries had been very rare, until of late, and only one or two had now occurred, since the abuse of special juries had been so prevalent.

GIBBS J. I never remember in the Court of King's Bench a rule of this sort discharged, where it had been regularly obtained. The course which I remember in cases where special juries have been moved for in trifling causes, or where there has been very little to prove, has been to direct that it shall be tried by a special jury in term time.

Rule discharged.

June 3.

GWINNESS and Others v. BROWN and Others,

If a Plaintiff, having sued out a *feri facias*, the Defendant pays the Plaintiff's attorney the debt and costs, without the writ being delivered to the sheriff, it is no contempt of the Court to attach the same money in the hands of the Plaintiff's attorney, for a debt due from the Plaintiff to the Defendant.

But *quare* whether the debt is such, whereon an attachment can be supported.

THE Plaintiffs in this case had obtained judgment for 611*l.* 8*s.* and sued out a writ of *feri facias*, directed to the sheriff of *Bristol*, and sent the writ to *Sherrard*, an attorney at that place, with authority to receive that sum. By agreement between *Sherrard* and *Carey*, the Defendants' attorney at *Bristol*, the *feri facias* was not sent to the sheriff's office, but *Carey* called on *Sherrard* and paid him the debt and costs. A few minutes after the money had been paid, an officer of the sheriff of *Bristol* served *Sherrard* with a foreign attachment out of the *Tolzee* Court of *Bristol* at the suit of the Defendants, against the Plaintiffs in this cause, who resided in *Ireland*, for 300*l.*, which sum was sworn to be due from the Plaintiffs to the Defendants, and which it appeared could not, for some cause or other, be set off in the action brought by the Plaintiffs against the Defendants; in consequence of which the Defendants had at the trial offered

offered to the Plaintiffs to refer the cause, which they refused. The attachment did not appear to have been sued out by *Carey*, the Defendant's attorney, but to have been issued by a person named *Hartley*; but it appeared that *Carey* had consulted counsel with respect to the attachment, and had been advised that it would lie.

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Vaughan Serjt. had, in the last term, obtained a rule *nisi* for an attachment against the Defendants and *Carey*, their attorney, upon the ground that the foreign attachment issued under the above circumstances constituted a contempt of the process of this court.

Lens and *Pell* Serjts. shewed cause against this rule: they contended that no contempt had been committed; the money would have been capable of being attached in the hands of the Plaintiffs' attorney, if the *feri facias* had been delivered to the sheriff, and the sheriff had paid over the money to him; and it was equally competent to attach it in the hands of the Plaintiffs' attorney, although he received it directly from the Defendants' attorney; and the Plaintiffs' situation was not worse now than if that had been done. No trick had been practised, but there was a mutual convenience in paying the money without executing the *feri facias*.

Vaughan, in support of his rule, cited 1 *Leon*. 264. pl. 353. that it was a contempt to attach money in the hands of the sheriff which he has levied in execution. So, money ordered to be paid under an award, is not the subject of an attachment. *Coppell v. Smith*, 4 T. R. 312. *Grant v. Hawding*, *ibid.*, determined the same point, where money was awarded to be paid under an order of *nisi prius*.

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The Court desired to abstain from giving any opinion upon this part of the case, whether the money in the hands of the Plaintiffs' attorney were properly the subject of a foreign attachment or not, as the question might probably come before them in another shape; but they threw out a doubt whether payment to the Plaintiffs' attorney were not similar to payment to a servant, which is payment to the principal. They observed, however, that in the city of *London* the form of the plea to a foreign attachment is not *nil debet*, but *nil habet*. As to the rule, they saw no trick in the conduct of the Defendant, though it would have been more candid if *Carey* had told the Plaintiff that he had it in contemplation to issue an attachment. But they did not discover how the Plaintiff could make this to amount to a contempt.

Rule discharged, but without Costs.

June 3.

SMITH v. BICKMORE.

A person who deposits in the hands of a stakeholder a sum as a wager on the event of a boxing-match between himself and another, may, after committing a breach of the peace by fighting, recover back his deposit from the stakeholder, having demanded it before it was paid over.

THIS was an action of *assumpsit* for money had and received, brought to recover back a sum of 25 guineas, which had been deposited by the Plaintiff in the hands of the Defendant, as stakeholder, upon a wager on the event of a boxing match between the Plaintiff and a person named *King*. Upon the trial of the cause before *Macdonald C.B.* at the *Chelmsford* summer assizes 1811, the evidence was, that the battle took place, but that the Plaintiff became tired of fighting, and ran out of the ring, after they had fought seven rounds. *King* waited five minutes for him to return, and upon his not appearing within that time, *King* was putting on his cloaths, when it was suggested

on behalf of the Plaintiff, that he should have another round or two. The persons present declared that *King* was already the winner, but *King* said the Plaintiff should have a little more, if he liked it, and they set to again; and while they were thus engaged, a constable came and separated the combatants. It was in evidence, that half a minute or a minute was the usual time for boxers to wait between the rounds, and that if a fighter did not return to the ring within a certain time, he was considered as having lost the battle. Half a minute or a minute was mentioned by some of the witnesses as the period to wait; others said five minutes: but it was in evidence that the time was usually a matter of special contract, and none such was proved here. After the battle, the Plaintiff demanded his 25 guineas of the Defendant, who declined to give it him. The Chief Baron left it to the jury to say, whether the battle was ended by the Plaintiff's going out of the ring; for that if it was, the Defendant was entitled to a verdict; but that if the battle was not ended by that event, the wager was not decided, for the parties had not done fighting when the constable came; and in that case the Plaintiff was entitled to recover. The jury found the fact that the fight was terminated by the Plaintiff's quitting the ring; whereupon the Chief Baron directed a nonsuit, being of opinion that the renewal of the battle was only honorary, and not a renewal of the wager.

Best Serjt. in *Michaelmas* term 1811 obtained a rule nisi for a new trial, upon the ground, that even if the battle was over when the Plaintiff quitted the ring, yet that the contract had been again opened by the mutual consent to return to the combat, and that the wager had not been decided at the moment when the constable appeared and interrupted the parties. He cited *Cotton v. Thurland*, 5 Term Rep. 405. *Howson v. Hancock*, 8 Term

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8 *Term Rep.* 575., and *Aubert v. Walsh*, ante 3. 277., to shew that before the determination of an illegal wager, it is competent for either party to rescind it, and recover back his deposit.

In *Easter* term 1812, *Best* was first heard in support of his rule: he contended that by consenting to renew the combat, the parties necessarily consented to renew the wager, which was the only object the Plaintiff had in view: if *King* had not meant that, the contrary should have been expressly stipulated. The wager, therefore, was still undecided, and the deposit might be recovered back. There was a marked distinction between the case of an action against a party to an illegal wager, as in *Lowry v. Bourdieu*, 2 *Doug.* 462. and an action against the stakeholder. Here the money was still in the hands of the stakeholder, and the wager being undecided, it might be recovered back. At one time, however, it was held that money paid over for the most illegal purpose might be recovered back, even after it had been applied. *Wilkinson v. Rich*, in 1 *Ld. Raym.* 89. [The Court observed, that that case had been long since overruled. *Chambre J.* intimated that this breach of the peace was *malum in se*, and that the distinction between *malum in se* and *malum prohibitum* was never taken in *Cotton v. Thurland*.] That distinction has been much doubted, and justly, for he cannot be a good moral man who will commit an act which the laws of his country prohibit even for reasons of policy. In *Lacausfide v. White*, 7 *T. R.* 535., the Court said, it was more consonant to the principles of sound policy and justice, that wherever money has been paid upon an illegal consideration, it may be recovered back again by the party who has improperly paid it, than, by denying the remedy, to give effect to the illegal contract. *Tappenden v. Randall*, 2 *Bos. & Pull.* 471., was decided

decided on the same principle. *Howson v. Hancock* only determined that where the stakeholder has, with consent of the loser, paid over the stake to the winner, the loser cannot sue him for it.

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Shepherd Serjt. contra, observed that the principle on which, in some of the cases cited, it had been held that the Plaintiff is entitled to recover, was, that having made an executory contract for an illegal purpose, he had a right, before he had done any act in pursuance of that executory contract, to rescind it. But here all the illegality was committed, the breach of the peace was complete, and it did not make the Plaintiff's right better, that he had to sue an innocent stakeholder, instead of the participator in the offence against the peace.

Cur. adv. vult.

MANSFIELD C. J. now delivered the opinion of the Court.

This is a motion for a new trial. On the evidence there was considerable doubt whether the wager was won or not; and the Chief Baron left it to the jury, who were of opinion that the wager was not won by the Plaintiff, because he went out of the ring. This is an action of *assumpsit* for money had and received, to recover back from the stakeholder a moiety of the money deposited. It is a very unfit question for a Judge and jury to try, whether the battle is won or lost; but without deciding that, it seems, by the case of *Cotton v. Thurland*, that the Plaintiff had a right to recover back his moiety. The law is got into sad confusion by contradictory decisions respecting illegal contracts. But this case seems made for the express purpose of confirming *Cotton v. Thurland*. In that case there was a doubt about the event, exactly as in this case, and the Court thought the money might be recovered against

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against the stakeholder. Now this is a case, not of an action against one of the parties to the wager, but against a stakeholder, therefore it is different from the cases of actions against underwriters to recover back premiums paid on illegal insurances. I cannot distinguish this case from that of *Cotton v. Thurland*, therefore there must be a rule absolute for a new trial, upon the ground that the Plaintiff is entitled to recover back one moiety of the sum jointly deposited to be fought for.

Rule absolute.

June 3.


FREELAND v. WALKER.

If a licence to trade be limited in duration to a certain day, and the vessel have not completed her voyage before the licence expires, it is incumbent on the Plaintiff to prove that such due diligence has been used by the master of the vessel, that the adventure is still protected within the spirit of the licence.

But if there has been no default in the conduct of the vessel, the licence, though expired, still protects the adventure till its completion.

THIS was an action upon a policy of insurance made the 14th of *January* 1810 upon a homeward voyage at and from the ship's loading port or ports in the *Baltic*, to her port or ports of discharge in the *United Kingdom*; warranted to arrive safe at *Carlsrona*. The ship left *England* under a licence to sail to *Sweden* or any port or ports in the *Baltic* and thence back to *England* with a cargo of the goods specified; and it was declared that that licence, which was dated the 1st of *July* 1810, should remain in force until the end of the first week of *December* then next. Upon the trial of the cause at the sittings at *Guildhall*, after *Michaelmas* term 1811, before *Mansfield C. J.*, it appeared that the vessel, which had sailed from *England* with an outward cargo, and discharged it in *Russia*, began to take in her homeward cargo at *Liebau* in *November*; that she obtained her clearance on the 29th of *November*, and broke ground before the 4th of *December*, on which day

day the licence expired, that by reason of shallow water, a considerable part of her cargo was necessarily unshipped and carried out over the bar in craft, and then reshipped; and that this delayed the vessel fourteen or fifteen days, so that she did not finally get clear of the harbour until the 29th or 30th of *December*. The vessel arrived at *Carlskrona*, but was too late by five days to join the convoy, and proceeding homewards without convoy was afterwards lost. At the trial it was objected, that the licence having expired, the homeward voyage became an illegal adventure. The jury, however, found a verdict for the Plaintiff, subject to this question.


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Vaughan Serjt. had in *Hilary* term 1812, obtained a rule *nisi* to set aside the verdict, and have a new trial, or nonsuit, upon the authority of the case of *Leevin v. Cormac*, *Easter* term 1810, *C. P.* *post.* p. 483.

Shepherd and *Best* Serjts. in this term shewed cause against the rule. They contended that the adventure was not vitiated by the circumstance that the licence had accidentally expired before the completion of the voyage, there being no bad faith or fraud, but a genuine diligence in pursuit of the voyage, and it having been the effect of delays incident to navigation, that the ship had not sailed for *England* in time to complete the voyage before the expiration of the licence. Licences were now to be construed liberally, and for the advancement of trade, as had been decided in many cases: and where there was no fraud intended, (and it was not intimated that this was a case of fraud,) it was sufficient that the voyage had commenced before the licence expired. An order of council had been made on the 18th of *July* 1810, for extending the time of all *Baltic* licences which would otherwise have expired on the

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the 29th of *September* 1810, and which were then very numerous, to a further period, viz. until the 14th of *December*; but that order in no way affected the present question, either in favour of the Plaintiff or of the Defendant. If the Courts put on the licences the strict interpretation, that after the expiration of the day therein assigned as their limit, they become wholly inoperative for one purpose, they must become so for all others; and one necessary consequence will be, that the vessels which happen to be kept out at sea, after the day when the licence expires, will be the legitimate subjects of capture by any *British* cruisers, as confiscated. Even if the cargo had been put on board in *October*, it might easily have happened that from danger of enemy's cruisers, or other circumstances, the ship could not safely proceed, so as to complete her voyage within the time limited by the licence. They said that the same point had been lately decided in the Court of *K. B.*, in certain cases of *Thompson v. Swansey* and *Hall v. Valentine*, before Lord Ellenborough C.J. at the Sittings after *Easter* term 1811, which were not in print, and also in *Schroeder v. Vaux*, 15 *Eust* 52. which was a much stronger case than this, for there the vessel had not attempted to sail until after the licence had expired.

Vaughan, in support of his rule, contended first, that the warranty that the ship should arrive at *Carlscrona*, had the effect of shortening the voyage insured, from a voyage at and from her port of loading in the *Baltic* to her port of discharge, to a voyage at and from *Carlscrona* to her port of discharge, in which construction, it was clear that the voyage had never begun, nor the ship broken ground from *Carlscrona* until long after the licence was expired, and so the voyage homeward never having had any inception as a legal voyage, the policy could not attach on it;

[But the Court were clear that the insurance was on the whole voyage at and from the port of loading in the *Baltic*, conditionally, indeed, that she arrived at *Carls-crona*, but that that condition being fulfilled, the underwriter was liable (taking the voyage to be legal,) for any loss that might have happened before the ship's arrival at *Carls-crona* as well as after.] He argued, that the order of council of 18th *July* 1810 extending the duration of the licences from 29th *September* 1810 to a later period, was an exposition by the authors of the licences, of the meaning of their own language, and proved, that if the time had not been enlarged, all the licences would have become void on the 29th *September*; wherefore this licence must also be taken absolutely to have expired, and become void at the end of the first week in *December*: and there were, no doubt, good political reasons for making the licences end thus abruptly on a particular day, without regarding the accidents of wind and weather, which reasons the Courts were bound to respect. He referred to *Muller v. Gernon*, ante 3. 394. *Leevin v. Cormac* was a still stronger case. The licence expired on the 9th *June*, and the vessel was captured on the 13th of *June*, only four days after; yet the Court was of opinion, that the assured must bring himself within the terms of the licence, and* that the underwriter was discharged. It is not, however, incumbent on the Defendant to prove that the voyage was not conformable to the licence and illegal, but since it is become *primâ facie* illegal by the expiration of the licence, it is at all events necessary for the Plaintiff to prove the circumstances that render it otherwise, and to shew that he has used that due mercantile diligence which may be an excuse for not conforming to the letter of the

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licence; and it is a question proper for the consideration of the jury, whether he has done that, which question in the present case, was never submitted to them.

Shepherd observed that it had never been objected at the trial on behalf of the Defendants, that there had been any *lashes* in obtaining or loading the cargo: it was taken for granted, that up to the period of the taking in the cargo at *Liebau*, there had been no loss of time.

It appearing upon reference to the Judges' notes, that this point had never been made at trial, nor the question submitted to the jury, the Court were of opinion that the case ought to be reconsidered. *Mansfield* C. J. reprobated the conduct of those who penned these licences, and made them to terminate at a given day, without the slightest allusion to any contingency wherein the perils of the sea, the act of God; of the enemy, or accident, could prolong the voyage for a single hour; expressing themselves, in the terms of the licence, as if they took it for granted that the whole of the voyage was to take place within the days limited, yet supposing that the Court can look into all the circumstances of the voyage, to examine whether the master of the vessel has exercised due diligence.

Gibbs J. observed, in the course of the argument, there had been at least fifty cases in the King's Bench, where the Plaintiffs had recovered, although the licence had expired at the time of the loss, and it never had been attempted to put the case upon the point of the licence being expired at the time of the capture.

The Court made the rule absolute; the Defendant giving judgment as of this term, and agreeing to bring no writ of error or bill in equity.

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LEEVIN v CORMAC.

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THIS was an action upon a policy at and from *London* to *Gottenburgh* and any port or ports of discharge in the *Baltic*, to return 5 per cent. if sails with convoy for *Gottenburgh*, and arrives, and 5 per cent. more if she sails for her port of delivery and arrives. This ship obtained a licence dated the 3rd of *February* 1808, with the usual proviso, that the ship should be proceeding direct to the port of discharge specified in her clearance, and expressing that the licence should remain in force four months. The ship was intended to go to the *Baltic*, but she cleared out from *London* for *Gottenburgh*, and her clearance expressed no other port of discharge, she sailed from *London* on the 13th and from the *Downs* on the 26th of *February*, for *Mosserland*; in her passage from thence to *Gottenburgh* she was delayed 20 days by adverse winds, but she reached *Gottenburgh*, where she was detained some time by an embargo, which however was taken off at the request of the *British* minister at *Stockholm*, and she left *Gottenburgh* again on the 22d of *May* for *Memel*, a further port in her way to *Conisburgh*; in her course, she was driven into *Malmoe* roads for five days by storms of weather; the four months specified in the licence expired on the 3rd of *June* 1808, and on the 13th of *June* she was captured in *Pillau* roads. Upon

the trial of this cause, at the Sittings after *Hilary* term 1810, before *Mansfield* C. J. at *Guildhall*, the subscription, loss, and interest, being proved, the defence as to the loss, was, that the voyage was not warranted by the licence, for two reasons; first, because the ship was not proceeding to the port of discharge specified in her clearance, and therefore was not within the exception in the orders in council of 11th *November* 1807, which it was necessary she should comply with, notwithstanding her licence; secondly, that at the time of her capture, she was engaged in an illegal adventure, the licence being expired. The Plaintiffs did not call the attention of his Lordship and the jury to the evidence of the embargo at *Gottenburgh*, as furnishing a special exception to the obligation to complete the voyage within the time named in the licence, and the fact, not appearing material, did not find its place in his Lordship's notes; but the Plaintiffs relied on the fact, that the voyage was legally commenced. And the Defendant, on the other hand, did not advert to the existence of the embargo, or its insufficiency as an exception, but relied on the fact that the licence was expired. It was further urged by the Defendant, that the Plaintiff was not entitled to recover any return of premium, because the words "and arrives," mean, if the

A voyage legalised in its commencement by a licence for four months which expires during the voyage, may be legally finished, if special circumstances, not in the power of the licensed person to control, clear of fraud and laches on his part, have protracted the voyage.

But it is incumbent on the assured to prove the special circumstances.

It is not necessary that the ultimate port of discharge of a licensed ship should be specified in her clearance from *Great Britain*.

Whether upon a stipulation to return five per cent., if sails with convoy for *Gottenburgh*, and arrives, and five per cent. more, if sails for her port of delivery, and arrives, a return of premium be due for her arrival at *Gottenburgh*, though she never arrives at her port of delivery, *quare*.

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arrives at her ultimate destination, and completes the voyage; and moreover, that as she was failing out of time on an illegal voyage, the contract could not be applied to such an illegal adventure, and no return of premium was recoverable. The Chief Justice reserved the points, subject to which the jury found a verdict for the Plaintiff.

Lens, Serjt. in this term obtained a rule *nisi* to set aside the verdict, and enter a nonsuit, against which,

Shepherd, Best and Vaughan Serjts. now shewed cause: they assumed that after the case of *Spitta v. Woodman*, ante 2. 416. it would not be urged as an objection to the voyage, that the ultimate port of destination was not specified in the clearance from *London*: the only question, therefore, was, whether the voyage was protected by the licence. It would be singular to say, that, when a ship sails legally by licence, if fairly proceeding on her voyage, she fails, by reason of unexpected circumstances, to complete it within the time specified by the licence, the voyage shall therefore become illegal. Sir *W. Scott* has held that under such circumstances a ship is not liable to confiscation. He thought not only that it must be so decided at this day, but that formerly, when licences were argued to be *strictissimi juris*, it would so have been held. Case of *Goede Hoop*, *Edwards*, 326. That was the case of a licence from *Charente*, *Bourdeaux*, or any port of *France* not blockaded, to any port of *Great Britain*, to continue in force for six months from 15th No-

vember 1808: one month for that voyage would be almost the longest possible time that could be necessary; for usually a few days will suffice. Sir *W. Scott* lays it down as a general rule, that where no fraud has been committed, where no fraud is meditated, as far as appears, and where the parties have been prevented from carrying the licence into literal executions by a power which they could not control, they shall be entitled to the benefit of its protection, though the terms may not have been literally and strictly fulfilled. In that case the vessel failed in *August* 1807 in ballast, to *Marrennes*, in *France*, she was there chartered to *Rochelle*, failed on 28th *March* 1809, arrived on 1st *April* at *Rochelle*, completed her loading on 13th *May*, failed from *Rochelle* on the 29th of *June*, having being detained to that time by an embargo, and was taken on the same day. So there the ship did not even begin her voyage till six weeks after the licence had expired; yet it was held that she was covered by the licence. The object of all these voyages to the *Baltic*, and to all these countries, which, as Sir *W. Scott* says, are more or less belligerent, is to seek a port; to find persons who are in so mitigated a state of restraint, that they can venture to purchase a *British* cargo: this may be termed a voyage of discovery to find a port. The time that such a voyage will occupy, must therefore necessarily be uncertain. If this ship, then, had been taken by a *British* force, and brought in hither, she would not have been condemned in the Court of Admiralty: this Court will decide the validity of the present contract

tract of insurance, on the same criterion of legality and illegality of trade, which governs the Court of Admiralty. The case of *Potts v. Bell*, 8 T. R. 561. went on that ground, where a bill of exceptions was tendered to the direction of *Buller J.* in this court, and the Court of King's Bench said, that as it was in numerous instances in the Court of Admiralty held illegal, it would be a monstrous anomaly to hold the voyage legal in the Court of King's Bench. In like manner, where that Court of Admiralty holds the voyage to be legal, this Court will also do the same. Sir *W. Scott's* judgment is founded on good sense. Case of *Johan Pieter, Edwards*, 354. decides the same point. It is clear in the present case, that these were the same goods, and the same voyage meant to be protected by the licence; no intentional delay was practised: and though it does not appear on the Judge's notes that the ship was delayed by the embargo, yet it appears that the ship was delayed by contrary winds for 20 days. At least, since the question of fraud or intended delay never went to the jury, and the objection arising on the mere words of the licence is answered by the authorities cited, the consequence is, that if these circumstances of the embargo, and adverse winds, are important, even taking it as incumbent on the Plaintiff to shew that there were causes which honestly prevented his performing the voyage within time of his licence, although it is rather incumbent on the Defendant to shew the fraud and illegality, [this was denied by the Court,] there ought not to be a judgment of nonsuit, but the Court

will direct a new trial, and permit the Plaintiff to prove these facts, which are a sufficient answer to a defence that came on him by surprise. At all events, the ship having sailed legally, with licence and convoy; the Plaintiff is entitled to a return of premium *pro tanto*: this case is distinguishable in that respect from the general case; for here the return is, "if the ship sails with convoy to *Gottenburgh*, and arrives, and a further return, if the ship sails with convoy to her further port and arrives;" the Plaintiff is therefore entitled to a verdict for the return of premium for arrival at *Gottenburgh*.

Lens in support of the rule, insisted, that after the time had expired, the Plaintiff was without a licence, if the limit contained in the licence was at all to be attended to. If it had been a narrow limitation of time, some allowance might have been reasonable, but here was an allowance of 4 months for a voyage which might not last 4 weeks. If the Plaintiff had asked of the Privy Council a longer time, he probably would have had it; and as he had exceeded the time he himself had fixed, his conduct was illegal. Why was any time fixed, if not to be observed? Though he exceeded only by a short period after the 4 months, yet the same principle would apply to a long period. In the case of the *Goede Hoop*, Sir *William Scott* evidently labours much to get rid of the general effect of the restriction: but there were special circumstances of detention, accounting for every week of the time, which affords a clear demonstration, that the ship could

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not otherwise have legally proceeded. Those judgments are bottomed on the ground that there were unavoidable accidents which the party could not controul; it no where appears, that in this case such circumstances existed, or that it was not the choice of the master to fail so late. The case of the *Johan Pieter* admitted of the same interpretation; and so far were these cases from shewing that the law was altered, and that licences were not now, as formerly, *stricti juris*, they only shewed that under the very special facts of those cases, an excess might be excused, but by no means established the principle that mere absence of fraud will suffice to legalize the delay. On the 27th September 1809, the Privy Council had issued instructions, (since the date of one of these judgments, and pending the other,) for extending the times specified in certain licences, from the 29th September to 3rd of October, on special circumstances, and giving the vessel safe passport for those 4 days: so far then was the Privy Council from supposing that any circumstances could enlarge the time of a licence, that they thought a special enlargement necessary for a short period, and thought that it was necessary to state the particular grounds on which the enlargement was required; evidently contemplating, that the licence extended only to the day therein mentioned. The Court, therefore, would only grant a new trial on terms of indulgence: if they permitted the Plaintiffs to amend their case, it must be on payment of costs. The Plaintiff was not entitled to a return of premium, for first, the words,

"and arrives," over-reached the whole sentence; and secondly, it was begging the question, to say that the voyage was legal; and the illegality would be retrospective, so as to prevent the return, although the illegality did not commence till after the vessel had left *Gottenburg*.

Mansfield C. J. The merits of the case have never yet been examined into. The cases decided by Sir *W. Scott* deserve the greatest attention: for it is impossible that the business of the country can go on, if the Court of Admiralty adopts one line of decision, and the courts of common law another. Much may be said on the necessity of adhering strictly to the terms of those licences; for it must be supposed, that when his majesty annexes a condition to his licence, it means something; and if there are circumstances which will render the voyage legal beyond the time mentioned in the licence, they ought to be specified in such licence; and persons who apply for such licences, ought to apply for the full time, within which a ship may with certainty be able to perform her voyage. Sir *William Scott* has decided in the two cases cited, that under particular circumstances, (and, to be sure very particular circumstances they are,) a ship, sailing after the expiration of the time specified by her licence, is saved from confiscation and capture. He is a Judge of great repute and learning, and his opinion is entitled to great authority. It seems as if the Plaintiff had never read his licence when he came to trial, or did not understand it; or had no idea that

that circumstances could extend the time thereby limited, for he was not ready to prove at the trial those circumstances which only could extend his licence: it would be very hard that the Defendant should therefore be put to the expence of another trial, where there was no mistake of the Judge or jury: the second trial therefore must be on payment of costs by the Plaintiff: I say nothing of the return of premium, because it

depends on the former question, whether the point may ever arise; but the words of this policy are very different from the words of some on which the Courts have decided. Let all the circumstances proved on the former trial on which there was no dispute, the subscription of the policy, interest, and capture, and a copy of the licence be admitted. Rule absolute for a new trial on payment of costs.

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1812.

BRANNING v. PATTERSON.

June 4.

THIS was an action upon a bill of exchange, in which, after judgment had been obtained, an order was procured to refer it to the prothonotary, to compute principal and interest; and the amount being computed, the costs were also taxed, and the Defendant taken in execution.

Notice must be given to the Defendant of the Prothonotaries appointment to compute principal and interest on a bill of exchange.

Best Serjt. obtained a rule *nisi* to set aside the proceedings for an irregularity, which consisted in omitting to give notice to the Defendant of the appointment of a day to compute the principal and interest.

Vaughan Serjt. now shewed cause against the rule, and

Per Curiam. This proceeding of a reference to the prothonotary is substituted for a writ of enquiry: and as it is necessary for notice to be given of the execution of a writ of enquiry, so is it necessary to give notice to the Defendant of the prothonotary's appointment to compute principal and interest, in order that the Defendant might have the opportunity of bringing forward any facts which have occurred to reduce the sum which the

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Plaintiff has a right to recover. This was determined a few days since, and our judgment did not at all proceed upon the ground that there was any difference whether the order for referring was obtained upon summons before a Judge, or by motion in court. As this was a mistake in the practice of the court, the Defendant is to bring no action against the sheriff.

Rule Absolute.

(IN THE EXCHEQUER-CHAMBER.)

June 5.

VERNON v. KEYES.

An action on the case for a deceit cannot be maintained by the seller of his share in a trade, against the buyer, who has persuaded him to sell it at a certain price, by a representation that certain partners whose names he will not disclose, are to be joint purchasers, and that they will give no more, although in truth they had authorized the Defendant to purchase it, doing the best he could, and although the Defendant charged them with a higher price than he gave.

THIS was a writ of error brought to reverse a judgment of the Court of King's Bench given for the Defendant, upon a motion made to arrest the judgment. See 12 *Eaft.* 632. The Plaintiff obtained at the *Stafford* Spring Assizes 1810 a verdict for 791*l.* 8*s.* 6*d.* upon the third count of the declaration, which stated, that the Plaintiff was desirous to dispose of a certain share or interest of his, in a certain trade, in which he was engaged with the Defendant, and in certain buildings, stock in trade, fixtures, utensils, tools and implements of trade, and other matters belonging thereto, and that a treaty was then pending for the purchase of the same by the Defendant; yet the Defendant, knowing the premises, but contriving to deceive and defraud the Plaintiff, while that treaty was depending, falsely, knowingly and deceitfully represented to the Plaintiff, that he, the Defendant, was about to enter into partnership in the said trade with divers other persons, whose names the Defendant would not then disclose, and that such persons would not consent or agree to the giving a larger

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larger sum of money to the Plaintiff, as the price of his share and interest, than a certain sum, to wit, 4,500*l.*; whereas, in truth and in fact, although the Defendant was then about to enter into partnership with divers persons, to wit, *J. Emery* and *J. Jenkinson*, yet *Emery* and *Jenkinson* had not, nor had any other intended partners of the Defendant, refused to give more than the said sum of money; and whereas *Emery* and *Jenkinson* had consented and agreed, and were then consenting and agreeing, that the Defendant should make the best terms he could with the Plaintiff, and would have given him a much larger sum, to wit, 5,291*l.* 8*s.* 6*d.* for the same; and whereas, in truth, the Defendant then charged *Emery* and *Jenkinson*, in their said partnership, at and after a much larger price, to wit, the price of 5,291*l.* 8*s.* 6*d.* for the same; by reason of which false representation of the Defendant, the Plaintiff was induced to accept and receive, and did accept and receive the said smaller sum, to wit, 4,500*l.*, as the price of his interest, and was induced to convey the same, and did convey the same, at or for the said price or sum of money; by means whereof the Plaintiff lost and was defrauded of a large sum of money, to wit, 791*l.* 8*s.* 6*d.*, which he otherwise might have got for the same. The Plaintiff assigned for error, that the matters contained in this count were sufficient in law for the Plaintiff to maintain his action; in as much as there was a fraud clearly alledged to have been committed by the Defendant, and a damage resulting to the Plaintiff from such fraud; and in as much as the Plaintiff could not by common, ordinary, or reasonable prudence or diligence have guarded against such fraud and deceit; and that the count contained every necessary allegation and a sufficient statement of an injury done by the Defendant to the Plaintiff, and damage sustained by the Plaintiff.

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Puller for the Plaintiff in error. The objections go rather to the mode in which the declaration alledges the facts, than to the principles of the case. As to the principle in *Pasley v. Freeman*, 3. T. R. 52., *Grofe J.* founded his judgment on this ground, that it was a representation unconnected with any privity of contract between the Plaintiff and the Defendant; and that to make such an action maintainable, the representation should have relation to some contract between the parties; here a privity of contract existed between the Plaintiff and Defendant; and the false representation was respecting the immediate subject of that contract; here also, the Plaintiff was entirely in the hands of the Defendant, and no diligence of his own would have saved him from being a victim to the Defendant's fraud; for he refuses to disclose the names of the other persons, so that no enquiry could be made of them: which distinguishes it from the case cited by *Grofe J.*, in *Pasley v. Freeman*; of *Bayley v. Merrel*, Cro. Jac. 386., and 3 *Bullf.* 94., which was an affirmation as to the weight of a load of madder, a fact the Plaintiff might himself have ascertained by weighing it; and this distinction is much relied on by Lord *Kenyon C. J.*, in his judgment in *Pasley v. Freeman*. and *Ekins v. Tresbam*, 1 Lev. 102. S. C. 1 Sid. 146., 1 *Keb.* 510. 518: 522., is a stronger case than this, for that was for a misrepresentation of the rent of a messuage, and where the action was held to lie; though it was urged that the Plaintiff might have asked the tenant as to the rent. And in *Lysney v. Selby*, 2 Lord Raym. 1118. judgment was given for the Plaintiff in a similar action, though it was there also suggested that the vendee might have enquired into the rents: but it was said, that the tenant might refuse to tell him; and judgment was given for the Plaintiff, which is much stronger than this; for there the Court proceeded merely on a possibility that the tenant might refuse

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refuse to inform the vendee : but here the Defendant, by refusing to tell the names of his intended partners, precluded the Plaintiff from the possibility of applying to them, and therefore the Plaintiff must recover : though it may be admitted, that if any negligence of the Plaintiff in error had brought him into this snare, he could not claim aid of the law to rescue him. [*Mansfield C. J.* Lord *Ellenborough* also observes, that it is not the duty of a seller to disclose the price he would take. The buyer and seller always try to outwit each other. And suppose a buyer carried 100*l.* in his pocket to make a purchase, and vowed that he would never give more than 80*l.*, and ^{he} got it for that sum, would an action lie ?] Certainly not : but as to giving more or less, a man may change his mind : and though from thence he may be called whimsical, yet how can it be said, he falsely affirmed he would not give more ; for at the time when he made the offer, he would not give more : and as to what a man would give, a jury could never get at all his thoughts. But this is not such a changeable fact ; this is positive in its nature, that at such a time, such an assertion was made by a third person. There is not one case in which it has been held that an action would not lie, in which the assertion has not been concerning a matter of opinion and judgment, and not matter of positive fact ; thus in *Harvey v. Young*, *Yelv.* 20. the misstatement was as to the value of a term of years ; and in *Pasley v. Freeman*, as to the credit of a person ; which are both matters of opinion ; but in this case it is a matter of fact ; the Defendant asserted as a fact, that *Emery and Jenkinson* would give no more than 4,500*l.* ; whereas he knew from them, that he was authorized to make the best terms for them he could. And by this fraudulent representation, he contrived to cheat both his past and present partners : and as was said by *Chambre J.* in *Tapp v. Lee*, 3 *Bos. & Pull.* 367. “ It would be an absurdity in law, to hold, that

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that if a man draws another into a snare, the party suffering should have no remedy by action." As to the form of the declaration, the objection in the King's Bench was, that the allegation "would not consent to give more than 4,500*l.*" may mean either that the partners then would not, (in which sense it would be untrue, and therefore would support the declaration;) or it might mean that they would not thereafter consent, (in which sense the words might be true or false according as *Emery* or *Jenkinson* should continue to refuse to give more, or should agree to give more :) and that therefore it came to this point, that as long as a bargain is unfinished, the buyer's mind is uncertain; and consequently it could not at that time truly be predicated with any certainty that they would give more. But if the word *would* may be read in two senses, one, such as will support the declaration; and one that will not; the rule of law is, that it must be read in that sense which will support it: and that, even in a declaration on a penal statute, as in *Wyatt v. Aland*, 1 *Salk.* 324. a principle which was recognized by the Court of King's Bench in *Rex v. Stevens and Agnew*, 5 *East* 244. where, upon the question whether "until" were exclusive or inclusive, the Court held it inclusive, because that gave effect to the indictment. Besides, this count is to be construed by itself; and here the word "would" is explained by the way in which it is used in the passage immediately preceding, viz. "would not then and there disclose." This is certain enough, for certainty to a certain intent in every particular is rejected in all cases as partaking of too much subtilty. *Rex v. Horne, Cowp.* 682. *per De Grey* C. J., referring to Lord Coke's definition of certainty. Another objection was, it does not appear that the other intended partners would have bought at all without the Defendant, or that the Defendant would have joined with them in giving 5,291*l.* 8*s.* 6*d.* This objection is founded in a misunderstanding of the nature

nature of the transaction. The Defendant had himself one third of the interest, and though his one third would stand nominally higher in proportion as a higher price was given, yet he was to pay no money; and he has charged the highest price in the partnership books, which is evidence made by himself that he would give that sum, and which he should not now be permitted to contradict.

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Peake, contra, was stopped by the Court.

MANSFIELD C. J. The question is, whether the Defendant is bound to disclose the highest price he chuses to give, or whether he be not at liberty to do that as a purchaser, which every seller in this town does every day, who tells every falsehood he can, to induce a buyer to purchase.

Judgment affirmed.

WAKE v. ATTY.

June 4.

THIS was an action upon a policy of insurance upon the ship *Monarch*, and freight, at and from *Malta* to *Gibraltar* and *Lisbon*, to return 4 per cent. for convoy to *Gibraltar*, 3 per cent. for convoy from thence to *Lisbon*, and 12 per cent. for such proportion of the freight as was due for the cargo discharged at *Gibraltar*, and 12 per cent. if the voyage terminated at *Gibraltar*. Upon the

A broker, in pursuance of instructions previously received from *Sunderland*, effected a policy at *Lloyd's*, at a time when a letter lay on his table at the coal exchange unopened, announcing the ship's loss. Held, the jury were warranted in finding this was no such want of diligence as avoided the policy.

In order to shew that a voyage without convoy from a foreign port is illegal, it is incumbent on the underwriter to prove that there is convoy occasionally appointed from that port, or some one resident there, authorized to grant licences to sail without convoy.

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trial of the cause at the sittings after *Michaelmas* term 1810, before *Mansfield* C. J., it appeared that the broker employed, first effected the policy on the 15th of *October*, in consequence of instructions dated the 13th of *October* from *Sunderland*; he had not, however, completed it until the 17th, on which day about ten o'clock in the morning he left his house in *Southampton Buildings, Chancery Lane*, with the policy in his pocket, prepared for the execution of the underwriters, and went to the *Royal Exchange*, where he procured the signature of the Defendant about eleven o'clock, without having previously called at an office which he had in the *Coal Exchange*, and to which letters addressed to him on business were usually directed. It was his habit to go to the *Royal Exchange* and transact his business there in his way to his office in the *Coal Exchange*. Upon arriving at his office on the 17th, he found there a letter which had come by that morning's post from his principal at *Sunderland*, written on the 15th, and stating that he had received on the 14th from the wife of the master of the *Monarch*, a letter in which the master stated that the ship had been captured nine days after leaving *Malta* on the passage to *Gibraltar*: a shipping list at *Lloyd's* stated the *Monarch* to have sailed from *Malta* on the 2d of *August*, *Best* Serjt. for the Defendant, contended that the broker had been guilty of gross and palpable negligence in not going to his office to read his letters relative to this transaction, before he went to the *Royal Exchange* to effect the policy: and *Mansfield* C. J. left it to the jury, whether the broker ought first to have gone to his office and got his letters, and whether, (adopting *Best's* phrases), the omission were gross and palpable negligence in him. It further appeared by a letter from the master of the vessel, which had lain some time at *Malta* waiting for freight, that he had at length chartered her for this voyage to sail

fail without convoy: the owner knew this at the time when he gave instructions for the policy; but it also appeared by the same letter, that it was not known when any convoy would be appointed. The vessel had no licence to fail without a convoy; and *Beß* contended that the charter party was therefore illegal, and that although the owner was not instrumental to the failing without convoy, yet that as he afterwards was aware of the fact of her having failed without convoy, before he gave the instructions for this policy, that was such a privity as rendered the insurance void. The jury found a verdict for the Plaintiff.

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Beß in *Hilary* term 1812, obtained a rule *nisi* to set aside the verdict and have a new trial, upon two grounds, first, upon a supposed misdirection of the learned Judge, for that it ought to have been left to the jury whether it was in the power of the broker, by the exercise of due diligence, to have acquired, before he went to *Lloyd's* and completed the policy, the information contained in the letter which then lay on his table; for that if it was, it was his duty to have opened and read the letter before he effected the policy: it was not necessary, in order to vacate the policy, that the broker should have been guilty of gross and palpable negligence, the broker being an agent paid by the assured, and therefore not excusable in any degree of negligence regarding the interests of the latter. He also contended, as before, that the Plaintiff could not recover, because the ship had failed without convoy. Privity after the fact is sufficient to vacate the contract. An underwriter is liable to a heavy penalty if he pays a loss on a vessel which has failed without convoy with his privity; to bring him within that prohibition, it is not necessary that he should know before the policy is effected, that the ship is to fail without convoy. The statute does not limit the privity

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privity either to the time of sailing, or to the time of effecting the contract. The prohibition extends to a privity at any time.

Shepherd Serjt. in this term shewed cause. The broker had, on the 17th, no reason to expect any further instructions relative to the effecting this policy: it was, therefore, no neglect in him to proceed to its completion without searching his office for further advices. There was no reason to think the *Monarch* a lost or missing ship. It is not to be contended that a merchant or broker must invariably open all his letters of the day, to however remote a part of the town they may be directed, before he can venture to transact any business.

Best and *Blosset* Serjts. contended, in support of their rule, that it would open a door to great frauds in the effecting of policies, if a broker might choose whether he would inspect his advices of the day or not, before he transacted his business at *Lloyd's*; for in that case, whenever he had reason to expect intelligence of losses, he would effect his insurances without reading his letters. In *London*, where persons are in the general habit of receiving letters from the country on subjects relating to their business, they ought duly to look at their letters before they proceed to transact their affairs; more especially if they be agents for both parties to a contract, as a broker is. 2dly, This adventure is illegal within the first clause of the convoy act, 43 G. 3. c. 57. s. 1., which, as *Lawrence J.* observed in *Hinckley v. Walton*, ante, 3. 34. "prohibits all voyages without convoy: then the voyage becomes illegal." If the owner had insured without knowing that she had sailed without convoy, the insurance would have been valid; but as he insured after he knew it, the policy is void. It is not incum-

incumbent on the underwriter to shew that convoy from *Malta* was appointed, and that this was, therefore, a case where the assured could not legally fail without convoy: it is for the assured to prove that no convoy was appointed, and that he might legally fail without convoy: he who would take advantage of a saving clause in a statute, must prove very thing that is necessary to bring himself within its protection.

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MANSFIELD C. J. *It was somewhat material in this case that the policy was begun a day or two before the Defendant signed it: it was quite a chance that the master happened to write detailing the loss to his wife in the country, who wrote to the owner. There is no ground to say the jury have done wrong. As to the convoy-act, if the first clause makes all assurances whatever illegal, unless the ship sails with convoy, a great deal of time has been wasted both in this court in considering the case of *Wainhouse v. Owie*, (*ante*, 4. 178.) and in the Court of King's Bench, in many cases where they have been occupied in enquiring whether the owners were privy or not.

*GIBBS J. This matter of due diligence has certainly been left to the jury, and they have decided it. The question is, whether the broker had a right to presume that he had possession of all the information on which he was to effect the policy, and the jury have found that he was entitled to presume that he had such information. With respect to the convoy, I have not the slightest doubt that the statute did not intend to affect the policies of any who are not privy to the sailing without convoy. The eighth section of the 43 G. 3. c. 57. excepts all vessels sailing from foreign ports, where no convoy is appointed, nor any person there duly authorized to appoint convoys or to grant licences. It does not appear

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in this case either that any convoy was appointed from *Malta*, or that there was any person there authorized by the admiralty to grant licences to sail without convoy; unless this therefore were shewn in the cause, it is not shewn that the master acted illegally in sailing thence without convoy.

Rule discharged.

June 4.

STRANGEWAYS v. ROBINSON and Another.

A bond, conditioned for payment to the overseers of a parish of a certain weekly sum so long as a bastard child shall continue chargeable, is not illegal or contrary to public policy.

To debt on bond, conditioned for payment of a weekly sum for maintenance of a bastard child, so long as it should be chargeable, it is no plea, that after the child attained the age of seven years, the putative father offered thenceforth to keep and maintain the child, and requested the overseers to deliver it to him, without shewing that the child was within the power and custody of the overseers.

Whether the putative father of a bastard child has a right to the custody of the child, *quære*.

DEBT on bond, dated the 18th of *November* 1802; the condition of which, upon oyer craved, appeared to be as follows: Reciting that *H. B.*, single woman, had then lately been delivered of a female bastard child, which was then chargeable to the township of *Aiskew*, and had charged the Defendant *J. Robinson* with being the father of the same, and that *J. R.* had already paid the sum of 1*l.* 10*s.* for the month the said *H. B.* was delivered of the child, and had agreed with the obligee to pay the weekly sum thereafter mentioned in full discharge of the maintenance and bringing up of the child, the condition was, that the Defendants, or one of them, their heirs, &c. should pay the obligee, and his successors for the time being, the sum of 1*s.* 4*d.* upon *Thursday* the 25th *November* then instant, and the further sum of 1*s.* 4*d.* upon every succeeding *Thursday* during so long time as the child should be chargeable to the township of *Aiskew*, and in full for the maintenance thereof. The Defendants pleaded, first, *non est factum*; secondly, that after making the

bond,

bond, and from thence continually until the child had attained the age of seven years and upwards, the Defendants paid to the obligee, overseer of the poor of the township of *Ajfkew*, and his successors for the time being, the sum in the condition specified, upon the several days therein mentioned, and from time to time as the same became due and payable, according to the condition; and that after the child was of the age of seven years and upwards, to wit, on 11th November, 1808, the Defendants were willing and offered to the then overseers of the poor of the said township, to nourish, clothe, and maintain the child at their own costs and charges, from that time, and entirely to relieve the inhabitants of the township from any charge for the further maintenance of the child; and requested that the child might be delivered up to the obligors for the purpose of being maintained and brought up at their expence, costs, and charges; but the overseers of the poor refused to comply with that request of the Defendants, to have, maintain, and bring up the child at their own costs and charges; and, of their own wrong, and against the will of the Defendants, had from that time hitherto taken and maintained the child at the costs and charge of the inhabitants of the township. They further pleaded, as to all the monies agreed to be paid weekly, which accrued due from the time of making the bond till the child attained the age of seven years, payment *post dies*; and as to the sums which had accrued since the child attained the age of seven years, that after the child had attained that age, the Defendants were desirous and offered to the then overseers, to take, keep, maintain, and nourish the child at their own expence, costs, and charges; and entirely to relieve the inhabitants of the township from all further charges in respect thereof, and requested the overseers to deliver up to the Defendants the child for that purpose, but that the

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overseers refused to comply with that request, and from that time hitherto, of their own wrong, had maintained and nourished the child at the cost and expences of the inhabitants of the township. The Plaintiff replied to the second plea, (protesting that the Defendants did not request the then overseers of the poor of the said township to deliver, and that the overseers did not refuse to deliver up the child to the Defendants,) that the child, from the time of its birth until and at the time of the supposed request, was and remained under the custody of the mother of the child; and if any refusal to deliver up the child was made or given, the same was made or given by the mother of the child, and not by the overseers of the poor of the township, or any of them, and that from and after notice of such refusal, until the making of the order hereinafter mentioned, the then overseers of the poor of the township did decline and refuse to give any further relief, or pay any sum of money for or towards the maintenance of the child: but that after such refusal, and after the then overseers of the poor had refused to advance any further monies towards the maintenance and support of the child, on the 30th *December* 1808, at *Thornton-hall*, at the township aforesaid, *F. Dodsworth D.D.*, one of his majesty's justices of the peace for the North Riding of the county of *York*, within which riding the township was situate, by order in writing under his hand and seal of that date, directed to the overseers of the poor of the township of *Aiskew*, after stating that *Hannab*, wife of *O. R.*, late *H. B.*, had made oath before him the said justice that she was very poor and impotent, and not able to provide for her female bastard child born in that township, and had applied to the overseers of *A.*, and was by them refused to be relieved, and that *G. Jackson*, one of these overseers, had been duly summoned to shew cause why such relief should not be given to the said

female bastard child, and had appeared, but had not shewn sufficient cause, he, the magistrate, thereby ordered the churchwardens and overseers of the township of *A.*, or some of them, to pay to the said *Hannah* the sum of 1*s.* 4*d.* weekly, upon every *Saturday*, towards the support and maintenance of the child, until such time as the overseers, or one of them, should come before him and shew cause why such relief should not be given her; and averring the identity of *Hannah* and the child mentioned in the order, with *H. B.* and the child mentioned in the condition, and notice to the Defendants of the order, he averred that the Defendants did not nor had, at any time since, taken any steps or proceedings to appeal (a) against, quash, or rescind the order, or to indemnify the churchwardens and overseers, or inhabitants, of the township against the order, or the maintenance of the child; and that the overseers of the township had not had, nor then had any cause to shew, nor could shew any cause, why such relief should not be given to the said *Hannah* for the support of the child, and that the order was still in full force, vigour, and effect, and that the child had, ever since the making of the order to that time, been and continued, and still was, chargeable to the township of *A.*, and that the churchwardens and overseers of the township, under and in pursuance of the order, and in order to prevent the child from perishing for want of necessary food and nurture, had paid the sum of 1*s.* 4*d.* weekly, on every *Saturday* since the making of the order, to the said *Hannah* for and towards the support and maintenance of the child, amounting to a large sum, to wit, 10*l.*; and that the child had, during that period, been maintained at the costs and charges of the inhabitants of the township of *A.*, and in consequence of the premises, and not of their

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(a) *Chambre J.* in the course of the argument observed that there was no such thing as an appeal.

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own wrong, of all which the Defendants had notice ; but although requested, had not paid the Plaintiff, or his successors for the time being, the said sum of 1s. 4d. weekly, or any part thereof, or any money whatever, for or towards the maintenance and support of the child ; but had refused ; and that the said sum of 10l. so paid for the child's support and maintenance for the period last aforesaid, was still unpaid, contrary to the effect of the condition. To the third plea the Plaintiffs replied the like replication. The Defendant demurred generally to these replications.

Clayton Serjt. in *Hilary* term 1812 was heard in support of the demurrer. First, the action is not maintainable, because the bond is void. The statute 6 G. 2. c. 31. §. 1. authorizes a magistrate in case of a charge of being the father of a bastard, to commit the person charged, unless he shall give security to indemnify the parish or place, or shall enter into a recognizance with sufficient surety to appear at the next general quarter sessions, and abide and perform such orders as shall be made in pursuance of the stat. 18 *Eliz.* respecting bastards. The law having, therefore, prescribed the course to be pursued, any other security not consonant to this statute, is illegal ; and therefore this bond is void. *Cole v. Gover*, 6 *East* 112. A promissory note to parish-officers, for a sum certain for the maintenance of a bastard child, of which the maker is the putative father, is bad. Whether the security be in form a bond or a note, must be wholly immaterial. This bond is not conditioned for indemnity, but for payment of a fixed sum per week, which comes within the mischief of a fixed sum in gross, for whether it proves to be too little, or too much for the maintenance of the child, the parish officers equally become speculators upon the question how cheaply they can maintain the child : the law prescribes an exact indemnity for all the maintenance that is reasonably

reasonably necessary, and neither more nor less. [The Court intimated a distinct opinion that this case did not fall within the mischief contemplated in *Cole v. Gower*: the parish might very reasonably have required more than 1*s.* 4*d.* per week; but the parish having calculated the sum they thought necessary, and the Defendants having agreed to it, the Court saw no reason why that agreement should not be good.] Next, the plea is good upon the authority of *Richards v. Hodges*, 2 *Saund.* 82., where, though a rejoinder averring the like request by the father, and refusal, was held to be a departure because the Defendant had pleaded *non damnificatus*, yet no question was made but that it would have been a good plea in bar, if the Defendant had so pleaded it originally, and in *S. C.* 1 *Mod.* 44. *Twisslen J.*, instructs the Defendant in what form he should have availed himself of these facts by way of plea: and *Wright J.*, in the case of *Newland v. Osman*, 1 *Bott.* 4 *ed.* 460. recognizes that opinion as a decision on the point. *Newland v. Osman* was a case of debt on bond conditioned to indemnify the parish from the maintenance of a bastard child. Plea, that the Defendant had maintained the child until 27th *October*, and then offered to take the child to maintain, and that the overseers refused, and if they had been damnified, it was in their own wrong. Replication, that for three weeks after 27th *October*, the Defendants did not provide nourishment for the child, but failed; and by reason thereof, the Defendants, after the three weeks, expended 3*s.* for the maintenance of the child, and were damnified. Upon demurrer, the replication was clearly held a departure; but the principal part of the argument turned on the validity of the plea; and *Lee C. J.* and *Denison J.* said, they had known this plea very often pleaded, and never heard it objected to. No distinction is made in that case between a putative father and any other parent: *Wright* and *Denison Js.* expressly say, it was never before doubted, but that a

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putative father had a right to take his bastard child from the parish. None doubted except *Foster J.* All the recent cases have arisen upon writs of *habeas corpus* to take bastard children out of the custody of putative fathers, who have forcibly possessed themselves of them; and they have been governed by the principle, that no one shall avail himself of his own wrong: but in *Rex. v. Mosely*, 5 East 224, n. &c. Lord Kenyon C. J. said, that “where the putative father had the custody of the child fairly, he did not know that the Court would take it away from him.” In the principal case, the child was admitted on the record to be above the age of nurture; and it was not in this instance a struggle between the father and mother, for the custody of the child, but between the father and the parish. The plea therefore was good; and if so, the replication did not answer it. First, the replication was bad in form, for the Plaintiff was bound either to traverse the plea, or to confess and avoid it, instead of which, he had put his replication by way of supposal, that, if the refusal was made by any one, it was by the mother. If the Plaintiff had chosen to rely on his order of a justice as an answer to the plea, he ought to have admitted the facts alleged in the plea; if he relied on the falsity of the Defendants facts, he should have expressly denied them, and not have introduced a fact, which, if the Defendants allegations are false, is unnecessary. His replication therefore is double, and contradictory, and informal. The Defendant is not bound by the tenor of the bond to pay the 1s. 4d. per week any longer than the child is chargeable; and if the child is chargeable by the Plaintiff's own wrong, the obligation ceases. The third point is the order of the magistrate, which is manifestly bad. It is not made on the Defendant, but on the parish officers, ordering them to maintain the child unless the overseers shew cause to the contrary: and the officer pleads he had no cause to shew,

shew, whereas it appears on the pleadings that he had cause to shew, namely, that the father had offered himself to maintain the child. No magistrate would have made such an order, if informed of the fact, and no notice was in fact ever served on the Defendant to appear, or shew cause against the order.

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Shepherd Serjt. contrà. 1st, As to the legality of the bond, the Court justly held in *Cole v. Gower* that it was contrary to the policy of the law, to make it not merely a matter of speculation, but the interest of the officers, that the child should perish, which was the case when the putative father stipulates to give a sum in gross. But this case is very distinguishable. The act says, the father shall give an indemnity to the parish; but it does not prescribe the form of the indemnity; and this bond is no more than a fair indemnity to the parish. This weekly sum is not payable for a number of years certain, or for a perpetuity: if the child dies, the payment ceases: the parish have therefore, no interest in the child's death; such a contract as that which is set out in *Cole v. Gower*, even if it had been made between the father and an individual, for the maintenance of a legitimate child, would have been void and illegal; for it rendered it the interest of those who had the charge of the child, to destroy it. [*Mansfield C. J. acc.*] But this is a reasonable and a proper security. 2ndly, As to the case cited from *Saunders*, all the modern cases have held that putative fathers have no further right to interfere to take a bastard child, than as every man is entitled to remove a child out of the custody of those who are treating it cruelly. A legitimate father has a right to the custody of his child against his will. But if an illegitimate child of the age of puberty, should object to be in the custody of the father, the Court would not give it to him. Whether the Court would take a bastard child out of the putative father's custody

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custody is quite another question. When the matter comes before the Court on a writ of *habeas corpus*, all these things can be taken into consideration to regulate the exercise of their discretion; in this action they cannot. *Holland v. Malken and Another*, 2 Wils. 126., and 1 Bott, 4th edit. p. 483. pl. 607. Willes C. J. said, "he would give no opinion whether the father has any power over the child, who is *nullius filius*. Grotius says, truly the mother is the only certain parent; and an order of justices to remove the mother, always removes the child." *Rex v. Soper* 5 T. R. 378. A child, three years old, was at the mother's instance, brought up by the putative father, who had obtained it by fraud; and it was urged that he had the right to the child. Lord Kenyon C. J. there says, "the putative father has no right to the custody of the child." A legitimate father might either by fraud or force take possession of his own child, and would have a right to say the child was his, and that he insisted on having the custody. He (*Shepherd*) had once attended as counsel on behalf of a mother, on a writ of *habeas corpus* before Lord Kenyon C. J., to prevent a legitimate child, little more than seven years old, from being carried to the *West Indies* by his father; but though the father had obtained the possession of the child from a school, both by fraud and force, and though Lord Kenyon would have preferred rather to have left the child in the custody of the mother, yet he held, that as he found it in the possession of the father, he must there leave it. *Rex v. De Manneville*, 5 East, 221. Lord Ellenborough's judgment there, and the case of Sir W. Murray, cited there by Lawrence J., as well as that of *Rex v. Soper*, and the last case cited, show that a legitimate father, who has a right to the custody of the child, may get at it by fraud or force. The Courts cannot take away the custody from the putative father, however obtained, if it is his right; and although in certain cases, as in *Rex v.*

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Mosely, the Court will not interfere to take it from him, that is because the occasion to take it from him has not arisen; for the only grounds of interference are, to prevent cruelty or brutality, or for the general interests of humanity. In *Rex v. De Manneville*, where the child was legitimate, the father had taken possession both by force and fraud, and the Court said, "We cannot help it: he having a right to it, is entitled to have it restored to him." In the other case, where a putative father obtains the custody by force and fraud, the Court will take it from him. *Rex v. Hopkins*, 7 *East*, 579., the Court, without touching the question of guardianship, thought it a proper case for the remedial writ of *habeas corpus*, to restore an illegitimate child to the quiet custody of the mother, whence it had been taken, first by strata-gem, and afterwards by force. It cannot be that the putative father has the right to the custody of the child; for if it were so, in certain cases it might happen, that the veriest vagabond upon earth might take a child out of the custody of persons in good circumstances, who are nourishing and educating the child. The plea therefore is bad, that after the child had attained seven years, the Defendants were willing to take and maintain the child at their own costs, but that the officers refused; for unless the father has a right to demand the child, the overseers are guilty of no breach of the law in refusing to deliver it up. But even if the father has a right to the custody of the child, yet the replication answers the plea; for the plea is, that the officers of their own wrong refused to let the Defendants maintain the child: the replication is, protesting that the Defendants did not ask, and that the officers did not refuse; that the refusal, if any, was made by the mother, and not by the overseers, or any of them; that then, is an answer to the plea; for the plea must amount to this, that the Defendants have not performed the condition, because the

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Plaintiff has prevented them: the Plaintiff replies, that it was not of the officers' own wrong, but under the compulsion of a legal authority, that they maintained the child, viz. under an order of a justice. This is no departure; it is a shewing of the mode in which the Plaintiff is damnified. The bond, therefore, is a legal bond. The plea is no answer to the declaration; it shews neither a performance nor a reasonable excuse for non-performance, and the replication does answer the plea.

Clayton in reply. No answer has been given to the objections taken to the order of the magistrate; and the counsel for the Plaintiff has hardly attempted to support the replication, which at least is bad for duplicity, and though the Defendant has not alleged duplicity as a special cause of demurrer, yet duplicity is matter of substance in a replication, for it leads to multiplicity and contrariety of pleading. At all events, the objections to the justices' order are matter of substance, not of form. If there was no right at all in the putative father, there would be no pretence at all for any discretionary interference of the Courts. Perhaps it is upon the principle of adoption, that in questions of *habeas corpus*, the Court proceeds more upon the ground of prudence and propriety and expediency, than of strict law. Many of the cases may be got rid of by those strong authorities which attribute to the mother the custody of the child during the age of nurture, the first seven years. The case of *Newland v. Osman* had not been shaken. And *Foster's* doubt confirms the case; for the authority of his name would have provoked the discussion, if the doubt were tenable. In *Rex v. Soper*, the expressions of Lord *Kenyon* must be taken, *secundum subjectam materiam*. "The father in that case had no right to the custody." The child was only three years old; and fraud shall avail no man.

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That too was between the father and the mother: not so here. *Rex v. Mosely* is rather in favor of the Defendant. [Mansfield C. J. How could the overseers comply with the request? what power had they to get at the child?] That objection is answered because it stands admitted on the record, that the overseers *have taken the child* and nourished it; therefore they must have had the child in their power. [Mansfield C. J. observed that neither the case in *Saunders* nor the other contained any allegation, that the father was of sufficient ability to maintain him.]

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MANSFIELD C. J. now delivered the judgment of the Court. The question of law which has been raised, certainly is not very clear, comparing the modern cases in the Court of King's Bench with the case of *Newland v. Osman*. The action is on a bond to indemnify the parish against the expenses of an illegitimate child. After reading the condition of the bond, his Lordship particularly stated the second and third pleas, dwelling on the circumstances that the second plea did not allege how long it was after the time that the child had attained seven years of age, that the Defendants offered and required the parish officers to let them take and maintain the said child at their own costs and charges, and observing that the plea did not name any day or time after the child had attained seven years, except the day under the videlicet, which, he said, was no day at all: and after stating the replications, his Lordship proceeded. The Defendants have demurred, but have not assigned duplicity for cause, as they might have done; but without such assignment they cannot avail themselves of this defect; for duplicity is a matter of form; and the plea being defective also, the Plaintiff is entitled to judgment. With respect to the great question, the cases cited from the Court of King's Bench go to shew that the father has no right to the custody of the child, and
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if those cases stood alone, there would be no doubt on the question; and in 2 *Wils.* 126. *Hulland v. Malten*, *Willes* C. J. holds that the putative father has no right to the custody of a child who is *nullius filius*, as the law calls him. On the other hand, my Brother *Clayton* cited a case from *Bott, Newland v. Osman*. Considering who the persons are who are likely to be fathers of children of this description, it is a very strong proposition to lay down, that any father, no matter who, any ragged vagabond whatever, although much less competent to educate the child than those who before had the custody, shall have a right to call for the custody of the child, the moment it attains the age of seven years. As to the plea, it contains no allegation that the child was in the possession of the churchwardens and overseers; and if the child was in possession of its mother, what right had the churchwardens to go to the mother, and make her deliver up the custody of the child? The plea should have stated that the officers had a power over the child and the mother, to make her deliver it up. Neither does the plea shew how long a time had elapsed between the end of the seven years, and the request, and how much money became due in that time. In the case in *Saunders, Richard v. Hedger*, it appears the child was not in the custody of its mother, but immediately in the care of the overseers, under a person to whom the overseers put the child to nurse, as appears by the rejoinder there; so the same objection did not hold to that rejoinder. The plea therefore being defective, the Plaintiff is entitled to judgment. I say nothing upon the grand point, whether, after the child is out of the age of nurture, any father whatsoever, be he who he may, can go to the mother and claim the custody of the child, upon that point the Court gives no opinion.

Judgment for the Plaintiff.

LANGHORN v. ALLNUTT.

June 4.

THIS was an action upon two similar policies of insurance, dated 16th *June* 1810, on coffee, sugar, and dying wood on board the ship *Constantia*, "at and from *London* to any port or ports, place or places in the *Baltic*, backward and forwards, and until the goods were safely warehoused at the house or warehouses of the consignees, including the risk of transshipment into boats, crafts, lighters, and vessels, of any denomination, to and from the vessel; with leave to seek, join and exchange convoys, carry and exchange simulated papers, clearances, and ship's papers, sail under any flag, touch, stay, and trade at all ports, places, and islands, for all purposes whatsoever, take in and discharge goods wherever the ship might touch at, and in case the commander of the vessel should find it dangerous to enter any of the above ports, or in case if not allowed to discharge the cargo, with leave to return to any ports or places, until the cargo is safely landed," at the rate of 25 guineas per cent. to return 5*l.* per. cent. for convoy from *Great Britain* to any ports in or off *Sweden*, and 5*l.* per cent. from any port in or off *Sweden* to the *Baltic*, and 10*l.* per cent. for arrival, and 5*l.* per cent. more, if discharges her cargo in *Sweden*. In case of loss, capture, seizure, or detention by any power whatever, to pay such loss or claim, whatever the same might be, after notification of the same signed by the assured of that policy, without waiting for condemnation, restitution, or any official documents; and it was thereby agreed that that vessel might touch at a *Swedish* port

missible in evidence against the principal.

Where a total loss is recovered, there cannot also be a return of premium for convoy, because the total loss includes the entire premium added to the invoice price.

for

Under a liberty to touch and stay at all ports for all purposes whatsoever, the stay must be for some purpose connected with the furtherance of the adventure.

Whether the purpose is within the scope of the policy, is a question for the Court.

The policy not limiting the time of stay, whether a ship has staid an unreasonable time, for the purpose, is purely a question for the jury.

Letters of an agent to his principal, in which he is rendering him an account of the transactions he has performed for him, are not admissible in evidence against the principal.

Letters written by an agent in making a contract, which form part of the contract, or of the *res gesta*, are a

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for orders. The Plaintiffs averred interest in themselves, and also in *Living, Downes, and Co.*, and a loss by hostile capture and *Prussian* capture. The cause was tried at *Guildhall*, at the sittings after *Michaelmas* term 1811, before *Mansfield C. J.*, when it appeared, that the vessel sailed in the beginning of *July* 1810 with convoy, with a cargo which was expressed in the bill of lading to be destined for *Carlsbam*, without mention of any further place: the invoices expressed the goods to be consigned for the account of *Living, Downes, and Co.*, and were addressed to *Winberg, Meyer, and Co.* for orders. It was proved by *Vandriel*, an agent of the consignors at *Carlsbam*, that the *Constantia* reached *Carlsbam* on the 23d of *July* 1810, where another vessel, named the *Elizabeth*, with a colonial cargo, likewise belonging to *Living, Downes, and Co.* and addressed to the same care, had also at the same time arrived. *Winberg* and *Meyer* acted solely under the directions of *Vandriel*. They were ordered by him to wait for instructions from *Schreiber*, another agent of the consignors, who was sent to the *South* of the *Baltic* to seek for a market for the cargoes, and to ascertain what papers would be necessary; and it could not be determined whether to send her until instructions were received from him. *Winberg* and *Meyer* dispatched the *Elizabeth* to *Dantzic* with all the expedition that was consistent with the time unavoidably taken up in procuring the necessary simulated papers. The master of the *Constantia*, being discontented that his vessel was not discharged upon reaching *Carlsbam*, where he supposed his voyage to end, refused to proceed: his reluctance, however, was overcome before *Winberg* and *Meyer* had procured the necessary documents to enable the *Constantia*

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stantia to fail. It being ascertained that confiscation would be the certain consequence of entering *Dantzic*, but there being reason to believe that *Stettin* would afford a safe market for the goods, the *Elizabeth* on the 4th of *October* went to *Swinnemund*, the port of *Stettin*, where she was captured on the 7th. *Winberg* and *Meyer* dispatched the *Constantia* also for that port, without any other delay than was requisite to obtain for her the necessary simulated papers; and she sailed for that place on the 11th of *October*, but upon her arrival on the 12th or 13th of *October* at *Swinnemund*, she was seized by the *Prussian* Government, and the cargo was confiscated and condemned as being *English*, in pursuance of the continental system established by the *French* government, and adopted in *Prussia*. The Defendants contended that as the vessel had lain at *Carlsham* two months and upwards after her arrival there, before proceeding to any port of delivery, and as there were no orders at that place, when she arrived, for her proceeding to any further port, whether the delay proceeded from the laches of the assured, or from a state of political events which rendered it impracticable to find a market, the insurance was at an end, and the Defendant discharged. The policy, they urged, did not include a permission to wait in any port an indefinite time, until the political state of *Europe* should be altered; if that were contended for, the assured might hold the underwriters on the policy for many years, instead of months, and of this matter the Court, and not the jury were to be the judges. The Defendants also contended that the delay was occasioned by other causes than the time required to procure the papers; and to prove the refusal of the captain of the vessel to proceed with the ship and cargo to *Stettin*, they offered in evidence letters from *Winberg* and *Meyer*, addressed to *Living, Downes and Co.*, and giving them accounts of the progress and ultimate

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event of the adventure, and of the efforts *Winberg* and *Meyer* had from time to time made to expedite the ships. The Plaintiffs objected to the admissibility of this evidence, upon the ground that what an agent says or writes, unless in the making of a contract for his principal, is not evidence against his principal; but that the agents themselves ought to have been produced as witnesses. *Mansfield* C. J. thought the evidence inadmissible, but very reluctantly, on account of the expence and difficulty of obtaining witnesses from abroad, rejected it. He thought it was to be left to the jury, and accordingly submitted to them, whether there was any fraud or neglect in the agents of the assured, in permitting the *Constantia* to sail on the 11th for *Stettin*, where the *Elizabeth* had been captured on the 7th, and whether the Plaintiffs had remained an unreasonable time in *Carlsham*; if they thought that there was no want of diligence and attention in not sending the *Constantia* sooner, the Plaintiffs were entitled to recover. The jury found a verdict for the Plaintiffs. The Plaintiffs also claimed a return of premium for convoy from *Great Britain* to *Carlsham*, over and above the total loss, but the jury refused to give it, on the ground that the assured had a right in case of a total loss to add the whole amount of the premium to his invoice, and so would recover it in that shape, included in the total loss.

Lens Serjt. in *Hilary* term 1812, upon the authority of Lord *Ellenborough*, C. J., who was stated to have so ruled it in a case of *Rucker v. Allnutt*, tried at the same sittings, since discussed in the Court of King's Bench, 15 *East*, 278. obtained a rule *nisi* for a new trial, or to enter a nonsuit, upon the ground that the words of the policy, large as they were, would not justify a vessel in going into a port and waiting there several months for infor-

information, and also upon the question as to the admissibility of the letters of the Plaintiffs' agents.

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Shepherd, and *Best*, Scrjt. in this term shewed cause against the rule; first, the verdict was well supported by the evidence: it appeared that the procuring the stimulated papers was attended with considerable difficulty, and occupied much time, but, on the very day after that on which they were procured, the vessel sailed. The terms of this policy did not require that the vessel should elect her port of discharge until after she had reached some port in the *Baltic*, and the assured having liberty to wait in the port for all purposes, it was within the scope of their privilege to stay there a sufficient time to collect information, before they made their choice: the *Constantia* was warranted in staying there while the assured first sent the *Elizabeth* to *Dantzic*, and until it was seen how she sped. They might have sent both, and both would have returned; and it was in favor of the underwriter, that by not doing so, he was spared the risk of the *Constantia*'s voyage to *Dantzic* and back. It was not prudent to disclose all the steps of the negotiation by which the fabricators at *Carlsbam* were persuaded to issue these forged papers. There was no evidence produced on the other side to shew that the ship had been detained an unreasonable time for the purposes contemplated in the policy, and the jury had decided that there had been no such delay. With respect to the admissibility of the letters, they urged that it was in evidence that *Winberg* and *Meyer* were agents employed by *Vandriel* only for the limited purpose of procuring the forged papers, they were not general agents, and their authority must be confined to the sphere of their agency. [But upon the supposition that they were general agents, the same arguments and authorities were pressed on both sides which the same counsel had urged

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on the same point in the preceding *Easter* term in the case of *Kahl v. Jansen*, *post*. p. 565., except that here the letters were not addressed by one agent to another, but to the assured.]

Lens, and *Vaughan*, Serjt., in support of the rule, contended, first, that *Vandriel's* account was incredible, and so the verdict against the weight of evidence; one set of simulated papers could have been prepared for the *Constantia* as soon as the other for the *Elizabeth*: the assureds were in fact looking about from port to port for a market, not waiting for papers. Secondly, that the risk could not last infinitely: there must be some length of time, the lapse of which would take a ship out of the protection of this policy, and that time had elapsed in the present case. In *Rucker v. Allnutt*, Lord *Ellenborough* had held that a four-weeks stay was sufficient to discharge the policy. Nothing would have hindered these parties from having limited this adventure in duration to six months, or twelve months; but as there was no limit expressed, and as upon the unlimited policy the risk had lasted more than a reasonable time, the circumstances, without any default of the parties, had discharged the contract. The jury, therefore, ought to consider whether there had not been such a fluctuation in the events on which the risk of the policy is to attach, that, without any fault of any party, the events themselves had put an end to the policy; a more extended field of risk having occurred, and more prolonged, than any parties could be supposed to have had in contemplation; and the jury must be furnished with some sound rule on the subject, and have another opportunity given them to apply it to these facts. For even if it were a question for the jury whether the stay had been reasonable, the jury had not exercised a sound discretion in the application of the rule to the present

present case. The vessel must have at least a general view to some particular voyage: it is not the meaning of the policy that if the assured thought fit, after his arrival in *Sweden*, to wait four, five, or six months, to see how political events would turn out, in order that a port might be the safer to him, he was at liberty to do so.

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MANSFIELD C. J. With respect to the question which has been agitated in this case, as to the receiving of these letters in evidence, it is impossible, I think, to find any principle on which they can be received. I threw out for the consideration of the counsel, that, which, I think, puts an end to the case; that if the circumstances had arisen at *Exeter* or *London*, there would have been no question; no one would have thought of offering the letters of a person written at *Exeter* as receivable in evidence here; and if that is the rule with respect to transactions which take place in *England*, how can we differ it with relation to the distance at which the transaction takes place? There is no known principle of law according to which the circumstance of an agent residing abroad, makes it practicable to give a letter in evidence, which could not be received if the agent lived in *England*. There is a mode of examining witnesses abroad by a commission, though it is tedious and expensive; but notwithstanding those inconveniences, we cannot substitute this for it. It is unnecessary to go into all the cases where letters of an agent have been received or rejected. The Master of the Rolls, in the case of *Fairlie v. Hastings*, 10. Ves. 123. has gone into some of them; but it suffices to say these letters are not a part of the *res geste*, not letters written in the course of the transaction, and forming a part of it; but a mere narrative. We cannot, therefore, receive these letters in evidence. With respect to the case itself, there are words as wide as can be in-

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troduced into a policy; and instances have occurred, where, even after a ship has been in her port of discharge, it has been necessary to weigh anchor, and seek another port of delivery, on account of the circumstances of *Europe*: it therefore becomes necessary to obtain the liberty of waiting to get information. It ordinarily happens that a Plaintiff's case is proved against the underwriters by his own agents; there is nothing singular in this case in that respect, nor is there any remedy for it. *Vandriel's* story was plain, consistent, and uncontradicted; and the jury believed him. If I had been upon the jury myself I probably might have given a different verdict, as thinking that the delay exceeded the bounds of reasonable time: the jury, however, have otherwise decided; and I know not how we can say that their judgment shall be reconsidered: the rule, therefore, for a new trial must be discharged.

HEATH J. I am of the same opinion, nor can I say I think the verdict against the weight of evidence in this case: to be sure great delay has intervened, from *July* to *October*, and the Plaintiff must give some account of the cause of it; he has given such account, and the jury have believed him. And what papers were these for which the ship is said to have been waiting? not papers of ordinary occurrence, but forged documents for a particular purpose: there might probably be more danger, difficulty, and delay in procuring them, than in procuring the ordinary papers at a custom-house.

CHAMBRE J. The length of time certainly creates a degree of suspicion, and calls for an explanation; that explanation has been given. Whether that explanation would have been satisfactory to any of us, sitting as jurymen, I do not know; it has been submitted to a special jury of merchants, who are very competent judges, and

they have found on it, and I cannot say they have done wrong; on the contrary, I think they have judged rightly. As to the letters, I think it quite clear that they were properly rejected; they are not part of the *res gesta*, but merely an account of them, and upon no ground admissible.

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GIBBS. J. I am quite of the same opinion: there are two questions, first, whether evidence which ought to have been received, was rejected; and secondly, whether the evidence which was received, supports the verdict which has been given; or rather, whether the verdict is contrary to the evidence. Now as to the first point, there is a clear distinction between those letters which are admissible in evidence, and those which are not. When it is proved that *A.* is agent of *B.*, whatever *A.* does, or says, or writes in the making of a contract as agent of *B.*, is admissible in evidence because it is part of the contract which he makes for *B.*, and therefore binds *B.*; but it is not admissible as his account of what passes. Now what are these letters? They are not part of the contract itself, or of the *res gesta*, but they are the account which the agent renders to his principal of what he is doing; they are not therefore admissible. The second point is as to the case itself; this is very different from the nature of policies on voyages, such as used formerly to be insured; and the underwriters are as well acquainted with the nature and extent of the risk as the assured. Now what are the risks? "to any port or ports, place or places in the *Baltic*." The ship is not bound to select her port before she commences her voyage, it is "backwards and forwards, with liberty to touch, stay and trade at all ports and places for all purposes whatsoever." The permission "to stay for any purpose whatever," must indeed be for some purpose within the scope of the adventure. Now what were the causes of

1812. the stay at *Carlsbam*? were they within the scope of the adventure? Yes: these persons were owners of the *Elizabeth*; they send her to *Dantzic*, and keep the *Constantia* at *Carlsbam*. I cannot say I think they acted imprudently in feeling their way. And it was a great advantage to the underwriters, that the *Constantia* should be saved from the risk and wear of the voyage to *Dantzic*. Now was this stay in the mean time a purpose within the scope of her adventure? Whether it was or not, is not for the consideration of the jury, it is a question solely for the consideration of the Court; whether the ship staid an unreasonable time or not for that purpose, was a question for the jury; and I cannot say I think she staid an unreasonable time, she seems to have staid as short a time after the papers were procured, as was possible; but whether she did or not, was for the jury to decide: they have decided, and I think, they have rightly decided; and I think the rule *nisi* for a new trial must therefore be

Discharged.

(IN THE EXCHEQUER-CHAMBER.)

June 5.

HILL v. SMITH.

In Error.

A prescription for toll in respect of goods sold by sample in a market, and afterwards brought into the city to be delivered, cannot be supported

THIS question arose out of two special justifications pleaded to a declaration in trespass for taking wheat and other grain of the Plaintiff, and converting the same to the Defendant's use. The second plea stated, as to the taking 30 pints of wheat, part, &c., that the city of *Worcester* is an antient borough or city, and the citizens

Whether toll of goods sold in a market can be due from the seller, *quere*.

A claim of toll-thorough cannot be supported without shewing a beneficial consideration moving to the person of whom it is claimed.

or

or burgesſes have immemorially been a body corporate by different names, until the charter of 19 *Jac.* 1. incorporating them by the name of the mayor, aldermen, and citizens of *Worceſter*; and that the ſaid citizens or burgesſes from time immemorial until that charter, and the mayor, aldermen, and citizens ſince, have had and held, and been uſed and accuſtomed, and of right ought to have and hold a market in the ſaid borough or city, in a certain place there now called the corn market, on every *Saturday*, (except when *Chriſtmas-day* happens on a *Saturday*;) for the buying and ſelling of wheat and other grain there; and during all the time aforeſaid have, at their own coſts and charges, repaired the highways and pavements of the ſaid corn market and other highways and ſtreets in the ſaid borough or city, for the more convenient bringing of grain into the ſaid borough or city to be ſold there; and by reaſon of the premiſes have immemorially taken for their own uſe a certain reaſonable toll, viz. one pint of wheat, corn meaſure, for every three buſhels of wheat, reckoning the ſame according to the quantity ſold and delivered as ſuch in the ſaid city or borough, ſold in the ſaid market by ſample, and afterwards brought into the ſaid borough or city to be delivered to the buyer, to be paid by the ſeller of ſuch wheat, (except in certain caſes ſpecified, which are not material,) and in caſe of non-payment of ſuch toll after reaſonable requeſt, &c. the corporation have immemorially taken a reaſonable diſtreſs for the ſame &c. The plea then alleged that the Plaintiff on a certain market day ſold to one *T. Hull* 31 bags, as for three buſhels of wheat in each bag, by ſample, to be delivered in the ſaid city, which ſaid wheat, of which the ſaid 30 pints were parcel, &c. was afterwards brought to be delivered to *T. Hull* in the ſaid corn market, in the ſaid city, &c. (negating its coming within any of the excepted caſes). That the Defendant, as ſervant of the corporation, requeſted the Plaintiff, then and there having the poſſeſſion of the ſaid wheat,

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to pay toll for the same, being in the said market place, and within the said city, and, upon his refusal, took the said 30 pints for and in name of a distress for the said toll. The third plea differed from the first only in introducing another case of exception, and in stating that in case of non-payment of such toll the corporation had immemorially taken the same out of the wheat so sold by sample in the said market, and afterwards brought into the said borough or city to be delivered to the buyer. The Plaintiff replied to each of these pleas *de injuria*, and traversed the prescription. Upon the trial of the cause at the Worcester summer assizes 1808, before *Le Blanc J.*, the jury found a verdict for the Defendants upon the second and third pleas, and the Court below, after discharging a rule *nisi* for a new trial, (reported 10 *East*, 476.), gave judgment for the Defendant: the Plaintiff brought error in this court.

C. F. Williams in Trinity term 1811, argued on behalf of the Plaintiff. The corporation claim a right of a mixed nature, partly as a prescription for toll of corn sold in the market, and partly as toll-thorough in respect of their repairing the streets. The last claim is untenable for want of consideration. They do not claim in respect of any right of soil. As to the first part of their title, toll is not incident to a market: the origin of tolls and markets is stated by *Mansfield C. J.* in the case of the *Bailiffs of Tewksbury v. Bricknell*, 2 *Taunt.* 120. A toll on sale by sample is not due of common right; and such a sale is subversive of the market laws of the kingdom. The reasons stated by Lord *Ellenborough*, in the case of the *Bailiffs of Tewksbury v. Diston*, 6 *East* 461., are applicable here: the benefits arising from the correction of the measures by the officers of the market at the time and place of sale, and the view of the entire bulk, are lost in the case of a sale by sample: so is the reduction of the price,

price, which takes place from fear that the vendor should be obliged to carry the goods back again unfold. So the benefit is lost of a sale in market overt, that the property, even if feloniously taken, is changed by a sale therein. Lord *Coke*, 6 *Rep.* 83. and 2 *Inst.* 713. speaks highly of this benefit. There are certain market laws for the benefit of the subject, and the king cannot grant a toll which interferes with them. The benefit of a court of *piè poudrè* is great, or at least formerly was, and every grant must be expounded, with relation to the benefits and laws which were subsisting when such grant was made. It is said by *Powel J.* in *Kerby v. Whichelov*, 2 *Lutw.* 1498. the king cannot grant a toll for things not brought into the market to be sold: the meaning of which must be, things not brought in bulk. This is the only ancient decision of any Judge on the subject. Lord *Ellenborough* follows *Powel's dictum*. All the old books which speak of the toll of corn, speak of the toll of goods brought into the market, *Co. Dig. Market, F. 1.* If toll be granted, of common right it is only upon a sale of live cattle, not of victuals, wares, &c. But by custom it may be due for all goods brought to the market. So, *ibid.* the king cannot grant a toll for goods not brought to the market, 2 *Inst.* 220. Toll to the fair or market, is a reasonable sum of money due to the owner of the fair or market, upon sale of things tollable within the fair or market, or for stallage, picage, or the like. And this was at the first invented, that the contracts might have good testimony, and be made openly, for of old time privy or secret contracts were forbidden, and this purpose of testimony is not answered by a sale by sample. 2 *Lutw.* 1336. "by law no toll is due except of goods sold, unless it be by special custom." By special custom therefore it may be due: from this the inference is, that the goods spoken of are brought into the market, because otherwise the toll cannot be levied. If 100 sacks are brought into
a market,

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a market, and exposed, but not sold, if toll may be demanded of it, that is a grievous injury to the subject. It is said in *Co. Dig. Market E.* citing, *Mo. 625.* the king cannot grant that a shop shall be market overt 15 *Co. 84.* *Not*, reader, the reason of this case (of market overt) extends to all markets overt in *England.* There are therefore privileges relating to a market, which the king cannot grant in derogation of the right of the subjects to market overt. 4 *T. R. 107. Mosely v. Pierſon.* Lord *Kenny* C. J. ſays, there may be a ſale by ſample in fraud of a market, but not *quæ* ſale in a market; for the expreſſion, a ſale in a market, imports that the goods ſold are brought into the market and ready to be delivered to the purchaſer. It muſt therefore be contended, that the bringing of a ſample, a handful of corn, into a market, is the bringing into the market of the corn ſold, within Lord *Kenny*'s dictum. If ſo, and if it be a caſe in which toll is due of all corn brought into the market, although unfold, it would be productive of extreme hardſhip: for if a ſeller produces a ſample of 100 loads of wheat which he has at home, he would thereby make toll to be due of the whole quantity, though unfold. There is no precedent in any books of toll on a ſale by ſample. In no book is there a ſingle caſe which can apply to warrant a toll on goods not brought into the market. It alſo appears that the toll claimed is not merely a market-toll: from the circumſtance that the preſcription requires that the corn muſt afterwards be brought into the city to be delivered, it may be inferred that the Defendants have no confidence in their claim of toll for corn ſold by ſample in the market: it is therefore mixed up with the circumſtance in the nature of toll-thorough, of its being afterwards brought into the city. Lord *Camden*'s judgment is very applicable to this confuſion, where he remarks on the plea, in 2 *Wils. 296. Truman v. Walgham.* No conſideration is ſhewn in this caſe to juſtify the

the claim of toll-thorough. It is not here stated that the corn is brought into the city over any part of the ways which the corporation repairs: and this also brings it within the principle of *Truman v. Walgham*, where the prescription was, that the Defendant amended divers and many streets in *Gainborough*, and it was not alleged that the Plaintiff went over any of them. Lord *Ellenborough*, on the motion for a new trial, noticed this defect, but said, as it was on the record it must be taken advantage of in another shape. Another material argument is this: by common law the toll is demandable only of the buyer, and not of the seller, 2 *Inst.* 221. 2 *Lutw.* 1336. *Mayor of Northampton v. Ward*, 1 *Wils.* 107. In this plea is no allegation of any demand having been made of the buyer or any refusal by him, “the said *T. Hill*,” the seller, not the buyer, “then having the custody and possession of the said wheat.” If the corn were to turn out unmarketable, or varying from the sample, the corporation would, therefore, according to this practice, have their toll before the buyer had had the inspection, or had received the bulk. In this case, therefore, the Defendant below is at all events premature in making his distress, because he does not wait till the corn is got into the hands of the buyer: he distrains for the toll before it is really due: for if the corn is never sold at all, the toll never can accrue due from the buyer: yet it is claimed from the seller. The *dictum* of *Powel J.* in *Kirby v. Whichelow* is cited by *Comyn* without any distrust. See also *Lib. Affs. anno. 22. pl. 58.* as to toll-thorough.

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Puller endeavoured to support the prescription stated in these two pleas. The corporation do set out the consideration for their toll, viz. that they are bound to repair the said corn market and other highways and streets in the said borough or city, for the more convenient bringing of grain into the said borough or city to
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be sold there. The Defendant alleges that the said corn out of which he took the toll, was brought to be delivered to the buyer in the said place called the corn market; so that it appears that it was in the corn market at the time when this distress was taken: this is material as to the point of consideration to support the toll. It has been argued to be radical defect, that it is stated as a toll for corn sold by sample in the market. But this stands on the record as the acknowledged immemorial usage; therefore the grant must be supposed originally to have contained words either express, or large enough by inference, to cover corn sold by sample. If the grant be, as it was considered in another place, a grant of toll for corn sold *quovis modo* in the market, it will include sale by sample. Inasmuch as these markets are all for the benefit of the subjects, and import a benefit to them, it is nothing unreasonable that the king should have granted the toll on all sales of corn, to be conducted in any mode soever that should in future days arise and become convenient. Lord Coke, 2 Inst. 220. says, toll was originally in consideration of the witnessing of the contract. This benefit is not taken away from a sale by sample. Consideration is necessary for toll-thorough; for the right of the subject to pass over the king's highway is antecedent to the right of taking toll; therefore the king cannot grant toll in derogation of that right, without a *quid pro quo*, a consideration, some proportionable benefit to the subject. It never was doubted that where no market had been before subsisting, the king might give the lord any toll he liked, in consideration of the benefit to the subject resulting from such market. Cro. El. 558. Heady v. Wheelhouse. Smith v. Shepherd, Mo. 574. The Defendant prescribed for toll on sheep passing through the town, and the Court said the inheritance of the subject to pass over the highway was antecedent to all prescriptions, 2 Lev. 96. Pridemore v. Warne,

v. *Warne*, S. C. 1 *Mod.* 104. The Plaintiff prescribed for toll of every ship that came within *Slipper Point*, in respect of his maintaining a wharf within his manor, and keeping a bushel, and claimed toll of a vessel which came within *Slipper Point*, but never used his quay, nor came within his manor; and it was held bad, for if the lord was at liberty to do what he claimed, it would be against common right; but if he had shewn the use of the lord's wharf, quay, or land, the prescription would have been good. How far toll shall be taken of goods not brought into the market, must, therefore, depend on the circumstance whether the market be beneficial to the parties or not. It might equally seem very unreasonable if the king granted toll of all goods sold within the market, for there might be a sale between individuals not occasioned by reason of the market; but there is the advantage of the testimony of the officers of the market, and other considerations and benefits may be had, though the goods be not brought into the market, 3 *Lev.* 37., *Mayor of London v. Hunt*. *Mayor of Yarmouth v. Eaton*, 3 *Burr.* 1402. So, *The Corporation of Exeter v. Trinlet*, referred to in 3 *Burr.* 1405., liberty to bring goods into a port is itself a consideration for a toll. And Lord Mansfield, in *The Mayor of Yarmouth v. Eaton*, said, the ownership of the soil is out of the case. This, then, shews, that the consideration of setting up the market, keeping officers, &c. is sufficient, without the ownership of the soil. Lord Coke says, "the witnessing the sale is the consideration of the toll: so may stallage, picage, or the like be." *Sargent v. Reed*, 2 *Str.* 1228. Prescription to take three bushels out of every ship's cargo of barley, and held good, because there the lord of the quay was the lord of the manor, and entitled as grantee of the soil, for depositing goods on his soil, and there he does not state any other consideration. But where the claimant has not the soil, he must

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must state a particular consideration. The king may grant a market to be held in a highway (subject to the question, whether he impedes the passage of the king's subjects, which perhaps he cannot do,) if it does not hurt any individual. [*Heath J.* The soil of the highway may possibly belong to the mayor.] It does not appear on these pleas whether it does or not. Although some part of the conveniences which a market formerly afforded, may not now be enjoyed under the system of sale by sample, the parties have many remaining, and others equivalent. The seller has the use of the place granted by the king to the grantee for the purpose of a market, the advantage of testimony, the convenience of meeting all his customers together, instead of going round from house to house: it is sufficient, if any benefit remains to the user of the market, which there certainly is, and a small benefit will support this grant. As to the *dictum* in *Lutw.* its authority may be admitted, because it is simply said, and without reference to any mode of bringing the goods into the market, whereas this corn sold in sample may be said in one sense to be brought into market. As to the other *dictum* that toll may be due, of goods not sold, it certainly is so, as in the case of *Litchfield* market, where a penny is due to the person who sweeps the market for all corn brought in to be sold, and carried out unsold. As to *Mosely v. Pierfon*, the words of two of the Judges are to be much attended to. Until very lately it was necessarily understood that all goods sold in a market, were brought into the market to be sold. *Asburst J.* says, this claim, being a matter *stricti juris*, it should be laid in the declaration with great precision; because it is to remain on record, as evidence of the right to future ages; and if the Plaintiff were to recover on this declaration, I think this record would be evidence of a claim of toll on contracts of sale of goods in the market by sample. He could

not have argued thus if he had not considered it as clear that if such a claim were in fact proved, it would be good in law. [*Mansfield C. J.* No: the record is evidence of the law to future ages, as well as of the fact, and therefore it does not shew that *Ashurst J.* thought that before such law was established by such evidence, such a prescription would be good. It leaves the case much where it found it, and only shews that he thought that a claim of toll on sale by sample would be included in a general claim of toll for all corn sold in the market.] In such a sale the party has conveniences sufficient to support such a grant, and the grant has thereby been explained to be that on which the Defendant stands. But, secondly, No consideration at all being necessary to be shewn, even if an imperfect consideration be shewn, it will not vitiate. If, therefore, it be said that as the Defendant has alleged a consideration, he ought to allege one that is sufficient; it is otherwise held in *Colton v. Smith*, *Co. l. p.* 47.; there a consideration was laid, and it was insisted, that as it was laid, it ought to be a sufficient consideration, whereas it did not extend to all who paid. But the Court held that although they there alleged a consideration for the toll they claimed, which would not support them in point of law, because laid larger than they could maintain, yet that as no consideration was necessary to be stated, it did not vitiate. And this is the distinction between that case and *Truman v. Wolgham*, which was a case of toll-thorough, where it was necessary to shew a consideration, and so are the cases explained: for the king has a right to grant a market and toll to any subject, so as he do not derogate from the rights of other subjects, and the customers have sufficient consideration from the market; therefore what is said of the consideration for toll-thorough does not hurt. And it necessarily appears that they who use the market have the consideration, which is

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the repairing the corn market ; and all who sell in it have benefit by the corn market. And if there had been an original free corn market, and the king had made a subsequent grant of the market with toll, to the corporation, they repairing the market, on a process to repeal that grant, the question would be, whether the king conferred a substantial benefit on the subject in imposing the toll ; or whether it were a mere pretence for taxing the subject ; and if it were a substantial benefit, the grant of toll would be good, in consideration of the benefit, though formerly the subjects had the market, without that benefit, gratuitously. It is not wonderful that no old cases are found in the books respecting it, for the practice of selling by sample did not, until of late, exist ; but it does not therefore follow, that if a grantor, foreseeing that the mode of selling would vary at a future time, should either have given expressly the toll on corn sold by sample in the market, or on corn sold *quovis modo* ; it should not be good. The lord of the market has not the less a right of distress on all the corn, supposing that the corn sold did not agree with the sample, and was not in fact delivered, the Defendant is nevertheless entitled to keep the toll, for the vendor has had the benefit of the market, and must not take advantage of his own fraud.

C. F. Williams, in reply. The Defendant cannot sever his prescription : and he states two ingredients in it : 1st, that the corn shall be sold by sample in the market ; 2dly, that it shall be afterwards brought into the city to be delivered ; but the second ingredient is wanting here. The subsequent delivery in the market-place has nothing to do with the prescription ; the plea does not aver that the wheat was ever delivered in the borough, but only that it was brought to be so, *non constat* whether any part of the market-place is or is not within the highways ; and therefore the case still continues within

that of *Truman v. Wolgham*; and the Defendant must shew, which he has not done, that the corn was brought over the roads which the corporation mended; all the cases cited will appear on examination to be of toll traverse; but this is of toll-thorough, not traverse. It is not true that the king may, on establishing a new market, grant any toll, of whatsoever amount: it must be reasonable. This claim being mixed of toll for a market and toll-thorough, the plea is not supportable in law.

Cur. adv. vult.

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MANSFIELD C. J. on this day delivered judgment. This case has remained so long, not so much from any great difficulty that attends it, as from the singularity of the case. The venue is laid at *Droitwich*, not at *Worcester*. The Defendant pleads a right under the corporation of the city of *Worcester*, to take the corn as a toll upon what is called, in the pleadings, a sale by sample. The sole question is, whether the prescription is such an one as can be sustained in law. If claimed as toll-thorough, it cannot be supported, for it is not alleged that the corn passed over any street which was repaired by the corporation. Therefore, there is no pretence for calling it toll-thorough. The plea must therefore rest upon the right to take toll of corn sold by sample. In stating that right, the Defendant alleges that the corporation repaired the streets for the more convenient bringing the corn into the city to be sold there. It is contended, that this claim cannot be supported. This is the first time such a toll was ever thought of. I was surprized that any evidence could be found to satisfy a jury that such a right existed. It is well known that sales by sample are of modern introduction, and it was so admitted by the Defendant's counsel, as an excuse for not finding any case in support of such a right. We understand at

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this day, what a sale by sample is, but there is no explanation of it in any law book. The sale by sample has no connection with the market; the corn so sold is never brought into the market; and if toll might be demanded for corn so sold, I cannot see why it might not be demanded for any sale whatever contracted for in a market; for the sample is only used to shew the quality of the thing sold. When one considers the sale by sample, as it is called, it is an abuse of the word sale. It is no sale at all. It is a contract to sell a quantity of goods answering to the sample, but not any specific goods: it is to sell 50 bushels of corn of such a quality, but no specific 50 bushels. The corn is not sold in the market; and the toll to be paid for a sale in a market, is for corn brought into the market, and there sold. Lord *Coke*, in his comment on the statute of *Westminster* the 1st, 2 *Inst.* 220. and on the stat. 31 *Eliz.*, *ibid.* 713. says, that the common law did hold it for a point of great policy and behoveful for the commonwealth, that fairs and markets overt should be replenished, and well furnished with all manner of commodities vendible in fairs and markets, for the necessary sustentation and use of the people; that fairs were invented that contracts might have good testimony, and be made openly, and that the seller might know what to ask, and the buyer what to give; and he quotes many passages, (and amongst others one from the *Mirror*, C. 1. s. 3., which I could not find,) which shews that the goods should be brought into the market, and that the goods should be sold there publicly. This sale by sample is directly contrary to the origin and purposes of markets; and it would be a strange thing, that toll should be taken by the owners of the market on that very transaction, which is contrary to the intention of the market. Lord *Coke* defines toll to be a compensation to the owner of the fair or market, upon the sale of things tollable within the fair or market. In *Mosely v. Pierfon*

the Court said, that the very words "sold in a market" implied that the thing must be in the market. If so, what sort of grant from the crown can we imagine to support this prescription? No particular case has been cited, in which there has been an exact decision that toll shall not be taken for goods not brought into a market: but in *Lutw.* 1502., *Powel* J. said that the king could not grant a toll of things not brought into the market, and Lord Chief Baron *Comyn* in title, *Market*, adopts the doctrine of *Powel*. All the doctrine of sales in market overt militates against any idea of a sale by sample; for a sale in market overt requires that the commodity should be openly sold and delivered in the market, and Lord *Coke* so says in his 5 *Rep.* 82., and that every part both of the treaty and completing of the sale must be in the market overt. It was properly argued by the counsel for the Plaintiff, that all the doctrine of the Court of *piepoudre* was contrary to the notion of a sale by sample. Such a sale could not possibly be the subject of that jurisdiction; for whatsoever is there determined, according to 4 *Inst.*, must be concerning matters only done on the day of that market, in the place and hours of the market, neither before nor after: no contract made before, or to be executed afterwards, can be the subject of the jurisdiction of that court; yet the law says, *piepoudre* is incident to every market and every fair, and has consueance of all matters arising in the market, consequently it is impossible that a sale by sample can be considered as a sale in the market. We are therefore of opinion that the prescription cannot be supported, and that the Plaintiff below is entitled to recover his damages, and the judgment of the Court below must be reversed.

Judgment reversed. (a.)

(a) The reporter is indebted for the judgment in this case, to the known accuracy of Mr. *Peake*.

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June 5.

**GOLDSCHMIDT and Others, Assignees of BOND, a
Bankrupt, v. LYON.**

A broker who is indebted to the assignees of a bankrupt for premiums due to them upon policies subscribed by the bankrupt before his bankruptcy, is not entitled to set off returns of premium due upon the arrival of ships which have arrived since the bankruptcy.

THIS was an action brought by the Plaintiffs as assignees of *Bond*, a bankrupt, against the Defendant for premiums of insurance due and payable to the bankrupt, as an underwriter, from the Defendant, previous to the bankruptcy. There were also counts in the declaration for money paid by the bankrupt for the use of the Defendant, and money had and received by the Defendant to the use of the bankrupt and on an account stated between the bankrupt and the Defendant. The cause came on to be tried before *Mansfield* C. J. at *Guildhall*, at the sittings after *Easter* term 1812, when a verdict was found for the Plaintiffs for 36*l.* 16*s.*, subject to the opinion of the Court on the following case. The bankrupt, previous to his bankruptcy, was an underwriter, and underwrote policies of insurance to the Defendant, who was a *West India* merchant in *London*, and effected insurances upon goods consigned to himself, acting in those cases as an insurance broker, as well as a merchant: the following policies were underwritten by the Bankrupt to the Defendant: 300*l.* on goods by the *British Queen*, at and from *Jamaica* to *London*, underwritten 25th *April* 1811, at a premium of 8 guineas *per cent.* to return 4*l.* *per cent.* if the ship departed with convoy for the voyage, and arrived. At the head of the subscriptions on that policy was the following declaration of the property insured; “on three hundred hogheads of sugar, valued at 23*l.* per hoghead, (900*l.* of which valuation was insured on another policy,) on account of the trustees and executors of *Richard Meyler* esq., deceased, for *Meyler-field* estate. 320*l.* on goods by the *Elizabeth*, at and from *Jamaica* to *London*, underwritten

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29th April 1811, at a premium of 8 guineas *per cent.* to return 4*l.* *per cent.* if the ship departed with convoy for the voyage and arrived, on 40 hogheads of sugar, valued at 23*l.* *per hoghead*, on account of the trustees of *Silver Grove* estate. And 300*l.* on goods by the *Thames*, at and from *Jamaica* to *London*, underwritten 29th April 1811, at a premium of 8 guineas *per cent.* to return 4*l.* *per cent.* if the ship departed with convoy for the voyage and arrived, on 50 puncheons of rum, valued at 30*l.* *per puncheon*, on account of the trustees of *Worcester* and *Roundbill* estates. At the head of each policy the name of the Defendant was inserted, *David Lyon*, agent. The premium on the *British Queen* was debited by the Defendant in his account with the trustees of *R. Meyler* deceased for *Meyler-field* estate. The premium on the *Thames* was debited by the Defendant to the trustees of *Worcester* estate. The premium of the *Elizabeth* was debited by the Defendant to the trustees of *Silver Grove* estate. The goods insured by all the said policies were consigned to the Defendant in *London*, and the insurances were effected on account of the trustees above named; but the Defendant had at the time a lien on the goods insured, and also upon the said policies, for monies advanced by him for the use of the proprietors of the estates from which the goods were shipped, and also for the premiums upon policies. All the said ships sailed with convoy, and arrived in the port of *London*, and reported at the custom-house in *London* as follows; the *Thames* and *Elizabeth* on the 22d July 1811, and the *British Queen* on the 24th July 1811. The bankrupt committed an act of bankruptcy on the 8th July 1811, and the commission of bankrupt issued against him on the 15th July 1811, and the Plaintiffs were duly constituted his assignees: and upon the balance of accounts between the bankrupt and the Defendant, the sum of 176*l.* 5*s.* was due from the

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Defendant to the bankrupt at the time of his bankruptcy, exclusive of the returns of premium mentioned in the above three policies, which amounted to 36*l.* 16*s.* : that sum of 176*l.* 5*s.* had been paid into court upon a plea of tender, which was admitted to have been made. By the course of dealing between the bankrupt and the Defendant, all returns of premium arising on the several policies were deducted from the amount of premiums payable upon the same policies underwritten by the bankrupt to the Defendant before such premiums were paid over. The accounts between them in each succeeding year were adjusted and settled up to the 31st *December* in such year; and if any returns of premium were still pending at the time of settling any account, the balance of such settled account formed the first item in the account of the ensuing year, and the pending returns of premium were, from time to time, as they occurred, brought to the debit of the bankrupt in such subsequent account; but the balance of each settled account was not paid over to the bankrupt, until 15 months after the settlement; so that all returns of premium were actually ascertained and deducted, before any part of the adjusted balance was paid over. The question for the opinion of the Court was, whether the Defendant was entitled to retain the said sum of 36*l.* 16*s.* out of the balance due by him to the bankrupt; and if he was so entitled, then a verdict was to be entered for the Defendant; if not, then the verdict for the Plaintiff was to stand.

Shepherd Serjt. contended, that the Defendant, who stood in the situation of a broker, and not of the assured, was not entitled in this case to set off the returns of premium, against the sums which he owed to the Plaintiffs for the premiums which had become due to the bankrupt as an underwriter; from the
 moment

moment that the underwriter had put his hand to the policy, not the assured, but the broker, was his only debtor for the premiums; but all returns of premium, as well as all losses, which became due, were a debt from the underwriter to the assured alone, and not to the broker; nor was the broker entitled to receive from the underwriter either return of premium, or loss, without an especial authority from the assured to the broker, warranting him in so doing; and consequently he could not by virtue of his character as broker, set off returns of premium in account with the underwriter. To this point he cited *Wilson v. Creighton*, cited in *Grove v. Dubois*, 1 T. R. 113. [Gibbs J. observed that the set-off in that case was confined to losses, and did not include returns of premium, and that the judgment of the Court there, went to that point only; and *Lenz* Serjt. for the Defendant, referring to a MS. note of his own, which confirmed the report in 1 T. R. agreed thereto, and observed that an inaccuracy in this respect had found its way into the statement of the case in a very learned work, 1 *Marsb. on Insf.* 2 Ed. 293. where the decision is reported as extending to returns of premium.] *Grove v. Dubois* was the case of a *del credere* commission, and therefore not applicable here. In the case of *Minett v. Forrester* in this court, *Easter* term 1811, *post*, p. 541. note (a), it was held, that there was no difference between losses and returns of premium in that respect, nor did it matter whether the return became due before or after the bankruptcy, the Court there decided that the bankruptcy determined every authority given by the underwriter to the broker, and that the broker could have no right to set off the return of premium in any case except on the ground of some authority that he had, to make adjustments; and that the broker was not in that case entitled to set off either the returns of premium which accrued before the bank-

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bankruptcy, or those which accrued after the bankruptcy, not having adjusted either of the items, and his authority being revoked by the bankruptcy. The Court went on this ground, that the adjustment by the broker is accompanied by an implied assent of the principal to the broker's receiving the money in order to account for it to the principal, but as no adjustment had taken place, there was no evidence of any such assent; but the right of the assured to receive it, arose, not by the adjustment, but by the event on which the premium became returnable. After an adjustment made by the authority of the assured, perhaps the broker could sue the underwriter for the balance, not however as for returns of premium, but only as for the balance of an account stated between those two persons. In the generality of cases it happened that a special authority was given by the assured to the broker, to settle losses and returns of premiums; and it was to be exercised by the brokers adjusting the account, and such an adjustment when made, may be considered as accompanied by the virtual assent, both of the assured and of the underwriter, that the sums due from the underwriter to the assured shall be set off against the sums due from the broker to the underwriter, and that the balance only shall be paid; but that is the same thing as if the returns of premium had been first paid to the assured, and by him lent to the broker, and the broker does not acquire that right by virtue of his character as broker, but only by reason of that special assent; and no such adjustment had been made in this case, nor consequently any such special assent given; nor could have any such have been made, the returns of premium not being due before the bankruptcy of the underwriter, and the bankruptcy being a revocation of any implied authority that had been conferred on the broker, to make such adjustment without the interference of the underwriter. Even if the bankruptcy had not intervened,

veried, the better opinion would seem to be that the return of premium could not be set off, if the Court of King's Bench had not decided otherwise in the case of *Shee v. Clarkson*, 12 *Fast*, 507; but, at all events, the bankruptcy having intervened, that circumstance materially differs this case from that. The broker cannot by any act of his done after the bankruptcy of the underwriter, change the rights of the bankrupt's estate.

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Lens for the Defendant. In the case of *Shee v. Clarkson*, the Court drew a clear distinction between what was due to the assured for losses, and what was due for returns of premium: they consider the latter as a part of the premium itself, which is not to be paid over, if the event on which it is returnable, ascertains the amount of the deduction before the premiums are paid; and that in such case the underwriter is entitled to receive no more in the first instance, than he would be ultimately entitled to retain on the balance of the premium account. But the supposed determination of the broker's authority by the bankruptcy does not affect the present Defendant. This is not to be considered as the mere case of broker and underwriter; if it were, it would be difficult to get over the authority of *Minett v. Forrester*; but the Defendant being under advances to the persons whose estates produce these goods, for which advances he has a lien, has an actual interest in the fugars, and so combines the characters of assured and broker; although the items in this account are dated in different years, yet it is all one account, and the several correlative items are all to be considered together, and the mode of dealing amounts to an agreement, whether considered as between broker and underwriter, or as between underwriter and assured, that there shall be a running account between them, in which the returns of premium shall form an ingredient. This therefore comes within the statute

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statute of 5 G. 2. c. 30., which extends to open accounts as well as liquidated accounts, and allows a set-off, not merely of mutual debts, but also of mutual credits; and although the underwriter might have originally received the entire premiums, if he had been so disposed, yet he has, by his course of dealing, agreed to keep open a mutual credit, and to receive the balance only, and it is wholly consistent with the judgment in *Minett v. Forrester*, that the parties may so deal together, as that the underwriter shall agree to receive only what upon the ships arrival shall appear to be due as the balance of the account of the premiums. That agreement made before the bankruptcy, is binding upon the Plaintiffs.

Shepherd in reply. The course of accounts stated to be adopted between the parties in the present case, made no difference, first, because it was the ordinary course of dealing between broker and underwriter; and secondly, because a broker could not give validity to any contract which should contain terms derogatory to the right of his principal: the contract which the Defendant's counsel contended was to be inferred from the course of accounts stated, must be mutually binding, if binding on either party. But if it were mutually binding, it would follow, that if the broker instead of the underwriter had been insolvent, the latter might set off the losses and returns of premium due from himself to the assured, against the premiums due to himself from the broker, a right which would be destructive of the interest of the assured; and therefore, as the contract could not be made mutually binding, it could not be binding on either party. The case of *Shee v. Clarkson* introduces so intricate a rule, that it will be difficult to follow it, and it may be said without hesitation, that if that case had been submitted to this Court, they would, in conformity to the principle which governed *Minett v. Forrester*,

Forrester, have decided it differently. The rule hitherto adopted between broker and underwriter is simple and well defined, and it is desirable to adhere to it.

MANSFIELD C. J. If we follow our determination in *Minett v. Forrester*, I do not see how we can possibly help deciding, as we did then, that these sums cannot be set-off, consequently the Plaintiffs are entitled to recover their 36*l.* 16*s.*

Judgment for the Plaintiffs.

MINETT and Another, Assignees of BARCHARD a Bankrupt, v. FORRESTER.

EASTER TERM,
1811. May 27.

THIS was an action of *assumpsit* for premiums of insurance due from the Defendant to the bankrupt before his bankruptcy, and for money had and received by the Defendant for the use of the bankrupt, to which the Defendant pleaded the general issue. The cause came on to be tried before *Mansfield C. J.* and a special jury at the *London* sittings after *Hilary* term 1811, when a verdict was found for the Plaintiffs for 39*l.* 6*s.* damages, and 40*s.* costs, subject to the opinion of the Court on the following case. *Barchard* became a bankrupt on the 16th *November* 1810, and a commission of bankruptcy afterwards issued against him, under which he was duly declared a bankrupt, and the Plaintiffs were his assignees. *Barchard* previously to his bankruptcy was an underwriter at *Lloyd's*, the Defendant was an insurance broker, and the bankrupt before his bankruptcy underwrote two policies, one of the 17th day of *April* 1810, to the amount of 300*l.*, on goods by the ship *Messina*, on a voyage at

and from *Oporto* to the *United Kingdom* at a premium of ten guineas *per cent.*, the bankrupt to return 5 *per cent.* if the ship sailed with convoy and arrived; and one other of the 17th of *August* 1810, to the amount of 300*l.* at the same premium, on goods by the ship *Sea Flower*, upon the same voyage, with a similar return: it is the invariable custom for the underwriters, where they subscribe a policy of insurance, to write against their respective subscriptions an acknowledgment of the premium having been then received, although it is never in fact paid at the time, but is entered by the broker, (less his commission of five *per cent.* thereon,) to the credit of the underwriter in an account between them, and, in like manner, is entered by the underwriter in his books to the debit of the broker; and the broker alone is afterwards considered as liable to the underwriter for the amount of the premium, after deducting the broker's commission. These policies were effected agreeably to that custom. The Defendant

An insurance broker who is indebted to the effects of a bankrupt underwriter for premiums, cannot, without an especial authority, set off against that debt, sums due from the underwriter for return of premium.

Whether the returns became due before the bankruptcy,

Or after the bankruptcy.

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was not interested in the property insured, but acted merely as a broker in effecting the insurance; and he had no *del credere* commission. The first mentioned ship sailed with convoy, and arrived before the bankruptcy; and there was a short interest, upon which the insured became entitled to a return of premium equal to *2l. per cent.* in addition to the *5l. per cent.* for convoy: the second ship sailed with convoy, and arrived after the bankruptcy; and there was also a short interest in that case, whereupon the assured became entitled to a return equal to *1l. 2s. per cent.* in addition to the *5l. per cent.* for convoy; the Defendant, previously to the commencement of this action, paid to the Plaintiffs the whole of the premiums due upon these policies, except the sum of *39l. 6s.*, being the amount of the returns for convoy and short interest above mentioned, which payment the Plaintiffs accepted without prejudice to their claim to recover the full amount of the premiums. The two policies remained in the hands of the Defendant from the time the same were respectively effected, for the purpose of settling any claims that might arise thereupon; but no adjustment had been made upon either policy; and the Defendant had no lien upon the policies as against the assured. The question for the opinion of the Court was, whether the Plaintiffs were entitled to recover that sum of *39l. 6s.* or any part thereof; if they were entitled to recover, then the verdict was to stand for the whole sum, or for such part as the Court should direct; if the Plaintiffs were not entitled

to recover, then a nonsuit was to be entered.

Leas Serjt. on a former day in this term, argued that the Plaintiffs had a right to the whole premium without deduction. The question must be on all intents the same as if the premiums had been paid to the underwriter so soon as the policy was underwritten. The contract between the underwriter and the broker, whereby the former gives credit to the latter, is a distinct contract. The return of premium, and payment of losses, are matters between the assured and the underwriter. *Shee v. Clarkson* 12 *Eaſt*, 507. will be relied on by the other side, where the Court of King's Bench considered the broker as the agent of both parties, and permitted the underwriter to recover against him the balance only; but here the interest of a third party is concerned, the body of creditors of the bankrupt, and as against them, the Defendant has no right to set off the sums due for losses and returns, whether for convoy or short interest. The assured has no concern in the contract between the underwriter and the broker. The broker cannot sue in his own name for the return of the premium, therefore he cannot set it off. It will be said, this is no set-off, but a deduction. It is neither the one nor the other, but the subject of a distinct account. It is the same in its nature as the claim for a loss: both are new claims, and arise from events subsequent to the right to the full premium. The case of *Wilson v. Creighton*, cited in *Grove v. Dubois*, 1 *T. R.* 113. was also cited in *Shee v. Clark-*

v. Clarkson, wherein the broker was not allowed to set off losses accruing before the bankruptcy of the underwriter. The Court held, that they belonged to the assured alone, and that the accounts could not be blended. It appears by a *MS.* note of the case *pens me*, that the losses were upon the same ships for which the premiums were due, and Lord Mansfield C. J. said, "the debt attempted to be set off, is a debt from the underwriter to the assured." If the premiums had been paid over by the broker, it would be quite clear that the broker could not have brought the action for the returns, but that the assured must have brought it. It is merely an accident, that the premiums remain in the broker's hands, but that will not give him a right of action or of set-off, which are correlative. *Grove v. Dubois* will be cited, but in that case the broker had a commission *del credere*, and consequently the solvency of the underwriter was warranted by the broker, and the case was decided on that ground. The decision in *Shee v. Clarkson*, if the principle be pressed to its utmost extent, cannot be reconciled to that of *Wilson v. Creighton*, which is the sounder doctrine.

Shepherd Serjt. contra. The bankruptcy makes no difference in the question; the matter must be considered in the same view as if the bankrupt himself were suing. *Shee v. Clarkson* is in point. *Grove v. Dubois* could not have been decided upon the ground of the commission *del credere*, for that would not enable the broker to sue in his own name, though it gave him the equitable right of suing in the

name of the assured, to recoup himself; and if he could not sue in his own name, neither could he set off the debt in an action against himself. It was therefore decided, not upon the ground of set-off, but upon the ground, that the underwriter was not entitled to recover any thing more than the amount of premium at that time payable. The events shewed that the premium was in fact less than what was first named. [*Mansfield C. J.* The assured might have taken the policy from the broker who effected it, paying him what he owed him at the time of taking it, and might have placed it in the hands of another broker to be adjusted. In that case the first broker would have had nothing to do with the return of premium. *Lawrence J.* Must not the broker be considered as acting in two distinct characters, as two agents? the one for the underwriters, and the other for the assured? If so, how can he deduct?]

Lens in reply. The Defendant's argument confounds the double capacity of the broker. The Plaintiff is entitled to recover on two grounds, first, because this is an action by assignees, in which the rights of the creditors, strangers to these dealings, are concerned, and so, this case differs from *Shee v. Clarkson*; for if this set-off be allowed, the broker will be enabled to recover the full debt due to the assured to the prejudice of the other creditors; secondly, because *Shee v. Clarkson* stands contradicted by the cases of *Grove v. Dubois*, and *Wilson v. Creighton*. See also *Robson v. Wilson*, & *Marsh. on Inf.*

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Inf. 294. S.P. The returns are money due, in a strict sense, to the assured. The premiums are money due to the underwriters. At all events, there can be no deduction for the ship that arrived, and the money that fell due, after the bankruptcy.

Cur. adv. vult.

MANSFIELD C. J. now delivered the opinion of the Court.

Upon considering this case, which is not exactly like any thing that has hitherto occurred, because here a bankruptcy had interfered, we are very unwilling to shake the authority of any case that has been decided; and one of the cases cited to us in the argument was that of *Shee v. Clarkson*. That was stated to be the last that had been decided on this subject; and it was determined in the Court of King's Bench. That judgment seems to have proceeded very much on the circumstance of the Plaintiff, (who in that instance was the underwriter,) having been constantly in the habit of settling and adjusting with the broker, and always allowing out of the premium which he was to receive, what was due from himself to the insured for returns of premiums accruing for short interest, or any other reason. In the present case we are of opinion that the broker is not entitled to set off or deduct either of those sums. The broker is agent for the assured, and also for the underwriter; he is agent for the insured, first, in effecting the policy, and in every thing that is to be done in consequence of it; then he is agent for the underwriter as to the premium, but for nothing else; and he is supposed to

receive the premium from the insured for the benefit of the underwriter; but the whole account with respect to the premium, after the insurance is effected, remains a clear and distinct account between the underwriter and broker. Exclusive of fraud and other similar circumstances, there is an end of every thing with respect to the premium, I mean, between the insurer and insured. The insurer, with respect to the insured, is supposed to have received the premium. The broker in fact gives the underwriter credit for it in his books, and the underwriter debits the broker for the amount of the premium in his books; and there is a running account between them. That being so, there is no doubt that at any time after the premiums have been so received by the broker, the underwriter may call upon him for these premiums and compel immediate payment of them, without any reserve in the broker's hands to answer any returns of premium, or any thing else that the insurer at a subsequent time may be bound to repay to the insured. This being the case, when once a bankruptcy has happened, whatever might be the case of *Shee v. Clarkson*, where the party himself brought the action, and where he had been constantly in the habit of allowing the broker to deduct out of the premium what was due on the adjustment to the insured, yet in this case we cannot say that the broker could be in any sense an agent for the underwriter after his bankruptcy; as the authority given by the underwriter himself ceases after his bankruptcy; and when he became a bankrupt, his right to the premium was immediately com-

communicated to his assignees; they had a right to call on the broker, and compel him to pay the premium to them for the benefit of the bankrupt's estate; and as the broker had never done any act by which he could be considered as a broker acting for them in any transaction, either in reference to an adjustment, or otherwise, we do not see how the

broker can make himself the agent of the assignees for the purpose of detaining money to be paid by the bankrupt to the insured; and therefore we are of opinion, upon both points, that with respect to this 39*l.* 10*s.* the assignees, the Plaintiffs, have a right to recover the whole of it.

Judgment for the Plaintiffs.

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June 6.

FRAAS v. PARAVICINI. (a)

THE Defendant was in custody in the gaol at *Exeter*, and the declaration was personally delivered to him and accepted by him there on the 25th of *November*, three days before the end of term, indorsed with a notice to plead in eight days: he pleaded thereto on the 2d of *December*: and the Plaintiff filed the declaration on the 10th of the same month; and some time after signed judgment as for want of a plea, and gave notice, on the 29th of *April*, of executing a writ of inquiry: upon which the Defendant apprized him that his judgment was irregular; but the Plaintiff, nevertheless, executed the writ of inquiry on the 11th of *May*, at which the Defendant's attorney attended and cross-examined the witnesses: and the Plaintiff afterwards signed final judgment.

Where a declaration was delivered to a prisoner in gaol, and indorsed with notice to plead in eight days, a plea pleaded before the declaration was filed, is good. But judgment having been signed for want of a plea, and the Defendant having taken part in the execution of a writ of inquiry, and final judgment being signed; held that the Defendant came too late to take advantage of it.

Vaughan Serjt. had obtained a rule nisi to set aside the judgment for irregularity, on the ground that it was signed after plea pleaded.

Boss Serjt. now shewed cause against this rule, and contended that the objection was too late after writ of

(a) *Gibbs* J. only was in court.

1812. inquiry executed and final judgment signed, particularly as the Defendant's attorney had attended the writ of inquiry and cross-examined the witnesses. He also contended that the judgment was regular, the declaration being against a prisoner, it was necessary that it should be filed, which was not done till the 10th of *December*, that plea, therefore, was pleaded before declaration, and there had been no plea since: the Plaintiff was entitled, therefore, to sign judgment for want of a plea.

Vaughan, contra. The declaration being delivered to the Defendant in person in the gaol, and accepted by him, it became unnecessary to file it. The Defendant gave the Plaintiff notice of the irregularity.

GIBBS J. I am quite clear the plea was well pleaded; otherwise a Plaintiff would mislead a Defendant who should plead according to the notice, by afterwards filing another declaration, to which the Defendant would not plead. In this case the Plaintiff delivering his declaration, indorses thereon a notice to plead in eight days: the Defendant need not have paid any attention to that notice; but if he waives the irregularity, and does plead to the declaration delivered, the Plaintiff cannot, I think, insist that the Defendant must plead to his declaration filed, and that his plea to the other is a nullity. It is too much for a Plaintiff to complain of being deluded by the proceeding of the Defendant which he has himself called for. But after assisting at the execution of a writ of inquiry the Defendant comes too late.

Rule discharged.

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CATTERIS v. COWPER.

June 8.

THIS was an action of trespass *quare clausum fregit*. The Defendant pleaded the general issue, and many other pleas which were immaterial to this question. Upon the trial of the cause at the *Cambridge* spring assizes 1812, before *Heath J.*, it being proved that the Defendant had entered the land and taken the produce, the question was made whether the Plaintiff had proved such a possession of the *locus in quo* as would enable him to maintain the action. The *locus in quo* was a piece of waste land lying between the farm which the Plaintiff rented, and the river *Ouse*; it bore grass, which every one cut who would, until within two years before the action, and the Plaintiff's only title was, that two years since, he had taken possession, and twice mowed the grass, and had since pastured a cow there. The Defendant's case was, that the first time the Plaintiff cut the grass, he had boasted that he had cut hay off land for which he paid neither rent nor taxes; that in a former year he had bought the hay cut by another man off this same land, and that a few years before the trial, in repairing the boundary fence of his farm, he had excluded by his fence the land in question, and had frequently shewn to other persons the boundaries of his farm, as excluding this land. The Defendant did not produce this evidence, because the learned Judge, upon the statement of it, held it insufficient to disprove the Plaintiff's title, for that there was evidence of sufficient possession against a wrong doer; and a verdict passed for the Plaintiff.

Mere prior occupancy of land, however recent, gives a good title to the occupier, whereupon he may recover, as Plaintiff, against all the world, except such as can prove an older and better title in themselves.

Blosset Serjt. in *Easter* term, had obtained a rule *nisi* to set aside the verdict, and have a new trial; and on

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this day he was called upon to support his rule. He admitted that the Defendant did not attempt to establish a claim under any older title than that of the Plaintiff, but urged that the Plaintiff had attempted to shew that this land was parcel of his farm, the rest of which he had occupied 20 years, and the possession of the land in question being only of two years duration, disproved that title, and did not constitute any title of itself.

Per Curiam. The cause was decided rightly upon the merits: the Defendant stands neither on any former possession of his own, nor derives title under the possession of any other person: his only objection to the Plaintiff's recovery is, that he has not proved the title he stood on, that this land was parcel of the farm he held; but no answer is given to the fact of his prior possession. The merits are clearly against the Defendant.

Rule discharged (a).

Sellon Serjt. was to have shewn cause against the rule.

(a) So, a Plaintiff may recover in ejectment, upon mere priority of possession, though all other title is expressly disproved. *Allen, ex dem. Harrison, v. Rivington, 2 Saund. 111.* So, he may defend an ejectment on the

like title, *Dox, ex dem. Burroughs, v. Reade, 8 East, 356.*, although he had been ousted of a former good title to the same land by 20 years adverse possession of a third person.

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TINCKLER v. PRENTICE.

June 9.

THE Plaintiff declared in debt for 82*l.* on an indenture of lease of the 18th July 1805, whereby *Richard Atkinson*, deceased, demised to the Defendant certain houses for 51 years, under 82*l.* rent payable at *Michaelmas, Christmas, Lady-day, and Midsummer*, free and clear of land-tax, property-tax, and all other taxes, and averred the entry of the Defendant, that *R. Atkinson* was seised in fee of the reversion of the premises, and by his will, dated 9th June 1806, devised the premises to the Plaintiff, and on 15th October 1808 died seised without altering his will, after whose death the Plaintiff became seised thereof in fee by virtue of that devise; and while he was so seised, and the Defendant so possessed, after the death of *Atkinson*, on the 20th of November, 1811, 82*l.* for one year of the term elapsed since the death of *Atkinson*, ending on *Michaelmas-day* 1811, became due and was in arrear. The Defendant pleaded in bar, as to 8*l.* 4*s.* parcel, &c., that before the rent became due to the Plaintiff, viz. on 28th of September 1811, the Defendant, then and long previous thereto being by himself and his tenants the occupier of the premises, and being tenant thereof, had paid a sum of money, to wit, 10*l.*, for and in respect of certain duties charged upon and payable by the Defendant as such occupier of the premises, by virtue of the act 46 G. 3. c. 65. (entitling it); and that so much of the duties so paid by him the Defendant in respect of the rent in the declaration mentioned to be unpaid to the Plaintiff as landlord of the premises, as a rate of 2*s.* on every 20*s.* thereof, would by a just proportion amount unto, did amount to the sum of 8*l.* 4*s.*, which sum he, the Defendant, did

In debt for rent, the tenant may plead, as to part, that he has paid landlord's property-tax to that amount, in respect of the rent due to the Plaintiff claimed by the declaration, after he has in fact paid the tax.

It is not enough to plead that the Defendant was on the premises at and a short time before sun-set on the rent-day, ready to pay, without averring that he was there long enough before sun-set to have counted the money.

A lease rendering rent clear of landlord's property-tax is good as a lease rendering the same rent, subject to a deduction thereout of the property-tax.

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deduct and retain out of the said sum of 82*l.*, the same being the first payment to be made on account of the rent of the premises to the Plaintiff, after the payment of the said duties by the Defendant as aforesaid. And for plea as to the said 73*l.* 16*s.*, residue, &c., that the Plaintiff ought not to recover any damages for the non-payment thereof, because he, the Defendant, on *Michaelmas-day* 1811, was, at, and shortly before the setting of the sun on that day, at and upon the premises, and was ready and willing to have paid the Plaintiff the sum of 73*l.* 16*s.*, residue, &c., the rent then due and payable after deducting the landlord's property-tax, as by the said act of parliament is directed, if the Plaintiff had been minded and desirous to receive the same; and that from that day continually hitherto he, the Defendant, had been and still was ready and willing to pay the Plaintiff the said sum of 73*l.* 16*s.*; and from the time the same became due until the commencement of the action, he, the Defendant, had sought the Plaintiff in order to pay him the same; but that the Plaintiff, during all that time, had purposely kept out of the way of the Defendant, in order to avoid the said sum being tendered to him by the Defendant; and he brought the sum into court. The Plaintiff replied, as to the plea above stated to be pleaded as to the said 8*l.* 4*s.*, that since the said duties were so paid by the Defendant as in that plea was alleged, the Defendant had not paid the Plaintiff the said sum of 82*l.*, or any other sum whatever on account of the rent of the premises; wherefore he prayed judgment of the 8*l.* 4*s.* And as to the plea pleaded to the sum of 73*l.* 16*s.* residue, protesting that the Defendant had not, during the time in that plea mentioned, sought out the Plaintiff in order to pay him the sum of 73*l.* 16*s.*, the Plaintiff replied, that he had not, during the time in that plea mentioned, purposely kept out of the way of the Defendant in order to avoid that sum being tendered

to him by the Defendant. The Defendant demurred to both these replications; and as to the first, he assigned for cause, that that replication was not prefaced or introduced by any apt or proper introduction whereby it might appear to the Court whether such replication were pleaded in answer to the whole of that plea of the Defendant above pleaded as to the 8*l.* 4*s.*, or only to a part thereof; but that the same replication proceeded immediately without any formal introduction to the matters therein stated and reserved; and also for that the Plaintiff had concluded that replication with a verification and prayer of judgment, and also with a prayer that the same might be inquired of by the country; (which was the fact). And he assigned for cause of demurrer to the last replication, that it purported to be an answer to the whole of the Defendant's last plea pleaded as to the 73*l.* 16*s.*; whereas the Plaintiff had altogether passed by a material part of that plea, and tendered an issue upon a single averment thereof only, which, if found for the Plaintiff, would not entitle him to judgment upon that plea. And also for that the said replication in that behalf did not fully and sufficiently confess and avoid, or traverse and deny the last plea, and was no answer to the same. The Plaintiff joined in demurrer.

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Vaughan Serjt., who argued in support of the demurrer, was called on by the Court to sustain his plea. He referred to the statute 46 G. 3. c. 65. s. 74. *schedule A, No. 4. Rule 9.*, and observed, that the plea had pursued the precise words of the act, which authorized the tenant to deduct the property-tax he had paid for the landlord "out of the first payment thereafter to be made on account of rent," and he said that this payment, therefore, operated as a discharge of the rent *pro tanto*.

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[The Court observed that the converse of that proposition had often been mooted, but never determined, viz. whether, if the tenant omitted to claim the deduction out of the *first* payment of rents made after he had paid the duty, he could deduct it out of any subsequent payment.] The second plea, he contended, was good.

Heywood Serjt. contra. The plea as to the 8*l.* 4*s.* is bad, first, because it does not shew that the duties which the Defendant claims to be deducted, became due during the time that the Plaintiff was entitled to the rents; if the duties were due in respect of rent which had accrued due to *Atkinson*, the devisor, in his lifetime, and now belonged to his executor, the Defendant could not justify deducting them from rent which he had to pay to the heir or devisee for such part of the term as had elapsed during their seisin. There might be an arrear of rent for many years, and then an assignment of the reversion. The lessee could not deduct all the property-tax he had paid for many years, out of the first payment of rent he had to make to the assignee. It was, therefore, incumbent on the Defendant to shew by his plea, not only that this was the first and next payment of rent, but also that the duty sought to be deducted was due in respect of the rent which was then first and next to be paid. The tenant might owe a year's rent to the ancestor and another to the heir, and he might have occasion to pay the heir first, yet clearly he could not deduct from his rent the property-tax assessed on the rent due to the ancestor. The statute, therefore, must mean that the duty shall be deducted out of the first payment to be made to the same landlord to whom the rent belongs in respect of which the duty was assessed; and that the Defendant has not sufficiently averred. The plea is also bad on another account: the property-tax is payable on the 20th of *September*, but the payment which

was

was made on that day was not assessed in respect of that portion of the rent which became due on the 29th; either the whole of the last quarter's rent, or at least the proportionate part which became due for the nine days intervening between the 20th and 29th was not the subject of that assessment; consequently, a corresponding part of the 8*l.* 4*s.* must have been paid in respect of part of the rent of a former year, and was not paid in respect of the year's rent from 29th *September* 1810 to 29th of *September* 1811, claimed by the declaration; wherefore the statute itself disaffirms the Defendant's express averment, that the duty was imposed in respect of the rent so due and unpaid. And it appears upon the record that he has deducted for at least nine days more than he is entitled to. But there is another objection more deeply founded to this claim of set-off. All parts of the act which mention the deduction of the landlord's duty, direct it to be made upon payment of the remainder of the rent. The tenant is to pay it in the first instance, out of his own pocket, not out of his landlord's rent. This act requires that in order to entitle himself to make the deduction, he shall first pay the residue of the rent, which has not been done here.

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MANSFIELD C. J. As to the point that the deed stipulates for payment of the property-tax, and that, therefore, the *reddendum* is altogether void, we have twice decided here (a) that the illegal part of the clause only is void, that is, as to the property-tax; and we have not set aside the whole covenant, going much further than the Court of King's Bench, where it was only held that the deed might be sustained, if the illegality were confined to the independent covenant. As to the first

(a) See *Fuller v. Abbott*, *ante*, 4. 103. and *Readshaw v. Balders*, *ante*, 4. 57.

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plea, the Defendant having paid the rate, he is entitled to deduct it.

GIBBS J. The Plaintiff is entitled to his judgment for the 73*l.* 16*s.* If one year's rent had become due before the testator had died, it would be payable to the executor, and the next year's rent would be payable to the heir; it might be that the tenant might pay the heir first; but he could not deduct from the heir the duty on the year's rent due to the executor. But it sufficiently appears by the plea that the duty was imposed in respect of rent belonging to the Plaintiff, and not to the devisor, and in respect of the very rent demanded; and the plea as to the 8*l.* 4*s.* is good. As to the rest the plea is bad. The last plea comes to this short point, whether the part of that plea which the Plaintiff has left unnoticed, be alone a sufficient answer to the Plaintiff's claim. It is necessary that the tenant should stay on the land to the very last time at which the thing can be done. But the Defendant has not stated, that at the time of his attending on the premises there was time, or not time left before the setting of the sun, to have counted the money. Therefore the Defendant, I think, can make nothing of that point; it is not sufficient to state that he was there at and shortly before the setting of the sun: he ought to have pleaded he was there long enough before to have counted the money.

Judgment for the Defendant on the first plea, and for the Plaintiff on the last.

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HUTCHINSON *qui tam* v. PIPER.

June 10.

THIS was an action upon the stat. of usury 12 *Anne*, *§. 2. c. 16.* for the penalties given by that act; and there were in the declaration counts on about 30 usurious transactions. The cause was tried at the *Spring Surry* assizes 1812, before *Macdonald* C.B. The Plaintiff's evidence was ultimately restricted to the 14th count, framed on a transaction which took place on 30th of *April* 1810. The writ was sued out 14th *March* 1811, but the declaration, though entitled of *Easter* term, was not delivered till the last day of *Michaelmas* term 1811, time to plead having repeatedly been obtained: and the question was, whether it was necessary to connect by proof the writ which was produced, and which had been sued out within the time of limitation in the statute, with the declaration in the cause? Such proof was not given, and the Plaintiff was nonsuited, but the Chief Baron reserved the above point on that single count.

Where a common *capias* is sued out within the time limited by the statute, and the Plaintiff declares on it in a *qui tam* action, it is not necessary to connect the declaration with the writ by any other proof than the production of the writ.

New trial is not a matter of right, and may be restrained to one point.

Best Serjt. had obtained a rule *nisi* to set aside this nonsuit, and that a new trial might be had, against which rule *Shepherd* Serjt. now shewed cause, and observed that the writ which was produced at the trial was a common *capias*, and though on such a writ a plaintiff might declare *qui tam*, yet it did not, on the mere face of it, necessarily appear to be the foundation of a *qui tam* action. Where there are several writs, and the second is not sued out in time, it is necessary to shew the first was sued out in time, and that the others were connected with it. The Plaintiff here therefore should shew

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shew that the writ was sued out in time and that the declaration *qui tam* is founded on it.

Best and Vaughan Serjts. contra, cited *Parsons v. King*, 7 T.R. 6. and were stopped by the Court.

MANSFIELD C. J. I do not see how this differs from the common case, I never saw any thing but the writ produced, no evidence is ever given that the action proceeds on that writ, the production of a writ within the time is enough. Here then is a writ within time, and produced, and as the Plaintiff may declare *qui tam* on it, there is no reason why it is not applicable to a *qui tam* action; therefore the rule must be absolute, for setting aside the nonsuit, and to have a new trial. But the Chief Baron certainly meant by reserving the point, to confine the Plaintiff only to this one count.

HEATH J. If they are to go down on the same trial of the same record, how are we to restrain them?

GIBBS J. A motion for new trial is not a matter of right. If the Chief Baron meant to give the Plaintiff leave to move on that point only, he will have only what is granted. If a new trial be granted because a Judge has improperly nonsuited the Plaintiff, I apprehend the new trial must take place upon the whole record, not but that there may be cases, in which the new trial may be restrained to a particular part of the record, as if the Judge gives leave to move on a point or part only, upon a stipulation understood, between the Judge and the counsel, that he shall not move on any thing else, or if on the evidence, the Court above thinks that justice has not been done, but that they shall do more injustice by setting the matter at large again, they may restrict the parties

parties to certain points on the second trial; but where the Plaintiff has been nonsuited on the misruling of the Judge, unless there be some agreement between the parties, we cannot confine them.

Rule absolute for a new trial generally.

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BRYAN v. WOODWARD.

June 9.

IN this cause the Defendant's bail had obtained a rule *nisi* to discharge the Defendant out of the custody of the sheriff of *Oxfordshire*, upon an affidavit, that in *November* 1811, when the arrest took place, the Defendant was a serjeant on permanent duty on the permanent staff of the 4th regiment of *Oxfordshire* local militia, and also that the amount for which he was arrested did not exceed 15*l*.

If a non commissioned officer has been arrested and gives bail, the Court will not, after judgment recovered against the bail, set aside the proceedings and cancel the bailbond.

Shepherd Serjt. now shewed cause against this rule, upon affidavits which stated that the Defendant had given a bailbond, and the Plaintiff had proceeded in an action thereon against the bail, who pleaded a sham plea, and that the Plaintiff had since recovered judgment, and that the bail had brought a writ of error, which was now pending: he contended that under these circumstances the Defendant was not entitled to relief: in the first place, it did not appear, that the principal Defendant was an object of the exemption from arrest. The statute 49*G.* 3. c. 40. s. 31. which was the only act applicable to this case, enacts that no noncommissioned officer in the local militia shall be subject to the provisions of the mutiny act or articles of war, except during such time as he shall be receiving the pay of his rank in the local militia,

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militia, or shall be called out, assembled, or embodied, under the provisions of 48 G. 3. c. 111. The statute 49 G. 3. c. 82. s. 1. by making a distinction between serjeants on permanent pay and others, shews that some serjeants are not on permanent pay: it was not sworn that the Defendant was receiving pay, and the fact was, that the local militia were not called out, assembled, or embodied at the time of the arrest. In the next place, the rule was incorrectly framed, as it prayed the discharge of the Defendant out of the custody of the sheriff, whereas he was not in custody: it ought to have been a rule for cancelling the bail bond, and setting aside the proceedings: but, thirdly, the privilege of exemption from arrest, is the privilege, not of the Defendant personally, but of the public whom he serves; and inasmuch as the public, since the giving of the bailbond, are in possession of his services, there is no ground for the interference of the Court: lastly, the application is made much too late, having for its object only the relief of the bail, and coming after the Defendant has not only given a bailbond, but permitted the Plaintiff to proceed against the bail to judgment, and incur so many unnecessary costs, and now delays him by a writ of error. The Defendant's bail ought not to be permitted to avail themselves of the objection in this stage, because they might have used it before; in like manner as nothing can be pleaded by way of *audita querela*, which could have been pleaded *puis darrein continuance*, or in bar. The Defendant is also a trader, wherefore his privilege ought not to avail him.

Lms Serjt. contrâ. The delay is equally imputable to both parties. The Court will not enforce the bail bond, if it ought never to have been given.

MANSFIELD C. J. In this case there is probably no difficulty at all with respect to the public, or with respect to the foldier; that is, if the foldier is arrested, though he might be willing to get out of the service, yet upon an application made on behalf of the public, he would be discharged; but this application is not made to obtain the services of the foldier; he may, for any thing that appears, be serving now; but it is made to relieve the bail after they have pleaded a sham plea, suffered judgment, and brought a writ of error; after they have thus drawn on and deluded the Plaintiff, they seek to take advantage of the situation of the Defendant, to deprive the Plaintiff of the fruit of his action. I therefore see no reason for relieving the bail.

HEATH J. It is not the privilege of the foldier, it is the privilege of the public; and if he has leisure, why may he not employ it in trading?

GIBBS J. The bail are not in such a situation, that they might, according to the general course of the law, by surrendering the foldier, discharge themselves; if they were, there might be some reason for relieving them, but as that is not so, there is none.

Rule discharged.

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June 10.

HOARE and Another, Assignees of PARNELL a Bankrupt, v. CORYTON.

To prove a petitioning creditor's debt, an account signed by the bankrupt, charging himself with a balance brought over on a day before the bankruptcy, is not admissible evidence, without positive proof that the bankrupt allowed the account before the bankruptcy.

THIS was an action of trover, brought by the assignees of a bankrupt, for goods taken in execution at the suit of *Collins*, and sold by the Defendant the sheriff. Upon the trial of this cause at the *Launceston* Spring Assizes 1812, before *Graham B.*, in order to prove the petitioning creditor's debt, the Plaintiffs produced an account, containing the following entry: "1807 October 31st. To balance brought on, 835*l.* 10*s.* 4*d.*" (signed) "*John Hoare, Christopher Parnell*;" and it was proved that these signatures were of the handwriting of the respective parties, and that the account was acknowledged by the bankrupt after the balance was struck; but it was not expressed that the balance was acknowledged, or the signatures put, at the time of the date, or at any other time before the date of the commission of bankruptcy, which issued in 1808; on the other hand, nothing came out on the cross-examination to countenance the surmise that it was signed after the bankruptcy. *Lens* Serjt. contended, that the account ought previously to be shewn to be made before the bankruptcy, because after the bankruptcy the bankrupt could not concert an account with a creditor, nor admit any thing that went to support his commission of bankruptcy; and that though the last item in the account was dated in 1807, and if it was made up immediately after that transaction, it would be evidence, yet, that inasmuch as there was no proof when it was made, it was inadmissible. *Graham B.*, thought this was *prima facie* evidence to go to a jury, that the account was made at the time it purported to be, and accordingly

left it to them, and they found a verdict for the Plaintiff.

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Lens Serjt. had in *Easter* term last, obtained a rule nisi to set aside this verdict and have a new trial.

Pell Serjt. now shewed cause against that rule, and contended, that since it stood at least indifferently on the evidence, whether the bankrupt signed the paper before the bankruptcy or after it, the paper and the date on it were *prima facie* proof of its being made at the time it purported to be; and it was therefore proper to be submitted to the jury. He also argued from the intrinsic evidence afforded by the date of items on the other side of the account, that it must have been stated on the 31st of *October*.

Lens, *contra*, contended, that whether the paper was admissible evidence or not, depended wholly upon the time when it was made, and the Plaintiffs did not attempt to produce any evidence that the account was allowed at the time when the balance is therein stated to have been due: it was incumbent on them to shew, that the paper was of such a description that it could be received in evidence.

MANSFIELD C. J. The very materiality of this paper depends upon the truth of its being acknowledged before the bankruptcy: that must be proved by evidence *dehors* the paper.

GIBBS J. The Plaintiffs were bound to shew by evidence, that the paper which they wished to produce was made and signed before the bankruptcy, and especially as it seems that the Plaintiffs took upon themselves to give evidence of an actual acknowledgement by

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the bankrupt besides the writing; they therefore certainly ought to shew, as part of their case, at what time the acknowledgement was made.

Rule absolute for a new trial.

June 10.

GOULD v. BRADSTOCK.

Held that trespass would not lie against a landlord who occupied an apartment over a mill demised to his tenant, from which it was divided only by a boarded floor without any ceiling, for taking up the floor of his own apartment and entering through the aperture to distrain for rent.

THIS was an action of trespass for breaking and entering the Plaintiff's mill, and taking his goods. The Defendant pleaded, first, the general issue; secondly, that he had distrained on the Plaintiff for rent of the mill upon a demise by the Defendant, and that after the five days elapsed, he had broken and entered the mill to get at the distress, and averred a tender of amends for the irregularity under the statute 11 G. 3. c. 19. Upon the trial of this cause at the *Worcester Spring* Assizes 1812, before *Marshall* Serjt. the evidence was, that the Plaintiff was in possession of a paper mill contained in a building, of which the Defendant himself, who was the landlord, occupied the upper story. A wheel in the lower mill was partly connected with the floor of the upper tenement, and covered with a board; there was no plastered ceiling below it. The Defendant took up the board, and thereby descended into the room below, and distrained for a year's rent which was in arrear, the Plaintiff having left the lower part locked up, and run away; and the question was made, whether the entry by that aperture to make the distress was lawful. The verdict passed for the Defendant: with liberty to the Plaintiff to move to set it aside. And accordingly *Shepherd* Serjt. had in *Easter* term obtained a rule nisi to set aside this verdict, and that a new trial might be had.

Best Serjt. now shewed cause against that rule; and admitting the law to be, that a man may not break the house of another in order to make a distress, or execute a writ of execution in a civil action, yet he urged, that the law in that respect was not to be carried further than the cases had already gone. Here the Defendant had not broken any part of the premises of the Plaintiff: for it was on the Judge's report, that the boards which were taken up, were the boards of the Defendant, and the floor of his own room, and it appeared that they were intended to be taken up; for there was no ceiling to the room below; though, in order to distrain, a person cannot break open the house, yet if he finds it broken, he may enter, which was the case here, for the taking was after the breaking, 9 *Vin. Abr.* 152. *M. pl.* 2. & 7. it is said that he shall distrain for rent *per ostia et fenestras*. And the protection extends only to the outward shell of the house: now here the Defendant was already within the inner door.

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Shepherd, contra. The argument that the Defendant may break his own floor to enter, would go to this extent, that if a landlord lives next door to his tenant he may pull down his party-wall and come in thereby. May a landlord come down a chimney to distrain? It is burglary to enter through a chimney, though in so doing, nothing is actually broken, and if goods had been stolen through this hole in the floor, it would have been burglary. This is not like entering through an aperture found, it is an express breaking for the purpose of entering. The lessor might in like manner have taken away the whole floor, contrary to his demise of a room protected by an inclosure on six sides. The floor is the upper barrier or surface of the thing demised, and if a stranger had broken it, the Plaintiff might have maintained trespass. And if the Defendant

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had dwelt below, and the Plaintiff above, the argument would have been just as good for the landlord to push out the boards, and so enter and distrain. The only legal mode of getting into a house is through the door. The right to go in must depend on the legality of the mode of opening; if he may illegally break the house at one time and enter at another, a sheriff might do the same, and contend that an execution so executed was lawful.

Mansfield C. J. The Plaintiff does not go on the act of 11 G. 3. c. 19. to recover damages for any supposed irregularity: he goes on the trespass; and he must make out that these boards were the Plaintiff's sole property, which as they were not: what is decided in this case will not do much harm or good as a precedent, for probably the circumstance never happened before, or will ever happen again: but the case is this; the Defendant removes the floor of his room, which floor was his; it is said, that it served as a ceiling to the tenant below, but that, at most, could only make him tenant in common, and one tenant in common, although he probably might have some remedy or other for being disturbed in the use of his ceiling, cannot bring trespass against his companion. After the Defendant has moved the boards he can get into the house, and that without a trespass; and when he can get into the house without trespass, he may lawfully distrain. I therefore think the law is with the Defendant.

The rest of the Court concurring, the rule was discharged.

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June 11.

KAHL v. JANSEN.

KAHL v. COLOGAN.

THESE were actions brought by the assured against the underwriters on a policy of insurance, effected the 28th of *October* 1807, and was "upon coffee and sugar on board the *Young Cornelius*, at and from *London* to *Christianfand* and *Amsterdam*, against all loss or damage, risks of seizure and detention, or capture, in or out of port, until actually safely lodged, free from all restraint, in a warehouse belonging to the assured at *Amsterdam*, warranted free from *British* capture." These causes were tried before *Mansfield* C. J. at *Guildhall*, at the sittings after *Michaelmas* term 1811, and at the trial the capture, interest, and licence, were clearly proved. It appeared that the ship sailed in the end of *November*, and arrived at *Christianfand* on the 20th of *December*. The bill of lading was to *Christianfand* only, to Messrs. *Matthison* and Co., the agents there of the Plaintiff. On the ship's arrival at *Christianfand* the captain applied for a clearance for *Amsterdam*, which was refused, and he applied again, but how often, did not appear; but at one particular time in *January* he was again refused. There was no evidence from whence it could be inferred that though the *Danes* refused a clearance for *Amsterdam* they would grant it to any other place afterwards. In *January* permission was obtained at *Christianfand* to land and sell part of the cargo there; and accordingly 50 or 60 casks of sugar, and 200 bags of coffee, the upper part of the cargo, were unloaded under bond. In *February* the captain, who had sailed with simulated papers to cover his cargo, in violation of the confidence of his owners, disclosed to the *Danish* government that

The letters of an agent of the assured in a foreign country, stating the contents of letters from another agent of the assured, are not evidence against the principal.

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the cargo came from *England*: on which the goods were seized. *Vaughan* Serjt., on behalf of the Defendant, contended, that as soon as the clearances were refused at *Christiansand*, the Plaintiff ought to have abandoned to the underwriters, if he conceived that the voyage was then defeated by an act of hostile seizure: but instead of taking that course, he had elected to make *Christiansand* his port of delivery in lieu of *Amsterdam*, and had taken the chance of that market; and had, by taking out part of the goods there, with the intention of selling them, voluntarily put an end to the voyage, and discharged the Defendant from the policy. An answer in Chancery was put in by the Defendant in the first cause, in which the Plaintiff admitted that the voyage to *Amsterdam* was abandoned after it became impossible to proceed thither, but not before: that the goods were landed at *Christiansand* with a view of terminating the voyage there, but not till after the clearance had been refused: and that the voyage was terminated before the goods were seized, but not before they were detained: and that the landing of the goods took place by the order of Messrs. *Matthison*. And in this answer certain letters from Messrs. *Matthison*, as agents to the Plaintiff, were admitted to have been written, and copies were annexed to the answer, which the Defendants proposed to read in the first cause, and in the second to read the letters themselves. One of these letters was from *Waltman* at *Amsterdam*, containing a letter which he had received from *Collinson*, a person at *Embsen*, who was a partner in Messrs. *Matthison's* house at *Christiansand*, and was to this effect: dated *Amsterdam*. "The *Young Cornelia* is arrived in *Christiansand*, but she dare not depart again, which is very good news, as here, all is shut up. Messrs. *Matthison* and Co. have communicated this to me from *Embsen*, and he says that his mercantile

cause house referred to another letter in which all is said; but that letter is not received," &c. The Defendants contended that these letters were part of the transactions of the Plaintiff in this cause. But the Plaintiff objected to their being read, contending that the Defendants had produced no evidence of any thing that these agents had done, so that they were not witnesses in the cause; but that even if they were, the agents themselves must in this case, as in all others, be called to give their testimony on oath. *Maesters v. Abraham*, 1 Esp. 375. And the Plaintiff further contended, that the letters were written without any authority from him. *Mansfield C. J.* thought the letters were not evidence, and could not be read: and accordingly the Plaintiff had a verdict in each of the actions; but the Judge reserved the point. And in *Hilary* term last *Lens* and *Vaughan* Serjts., for the Defendants, obtained a rule nisi to set aside the verdicts, and that new trials should be had; against which rules

Shepherd and *Best* Serjts. in *Easter* term shewed cause, and contended that though where an agency has been clearly established, what an agent says or does is evidence, as in making a contract; still it goes no further; and what he says of a contract after it is made is not evidence. In insurances, the letters of agents, describing the state of the ships, are evidence; but only to shew the extent of the knowledge of the assured on the subject at the time of the insurance, and as part of the *res gesta*. So also, letters in many other cases are admissible, but not as if they were metamorphosed into witnesses, and put into the box to swear the facts contained in them; for when the witness is in the box his letters are not admissible; but only his own evidence of what he has done, *Maesters v. Abraham*. But in this case, any thing that *Waltman* wrote at *Amsterdam*

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could not prove what happened at *Christianfand*. It does not appear even to be proof that *Amsterdam* is shut up, as he says; for he was only to be consignee of the goods, in case the ship arrived at *Amsterdam*, and as the ship did not arrive there, he was not consignee. He did not even profess to write this information as of his own knowledge. *A.* writes to *B.* that *C.* had written to *A.*, saying that *D.* had written to *C.* that certain facts had occurred. If *Waltman* were now examined in person, he could only say that *Collinson* had told him, that *Matthison* had told him *Collinson*, that certain events had happened at *Christianfand*. If, (which is still stronger), the Plaintiff had been at *Christianfand*, and *Waltman* being in the witness box, had sworn that *Collinson* told him that the Plaintiff had told him *Collinson*, that such events had happened, that evidence would not have been admissible; for the declarations of agents, to be admissible, must at all events be of things they know of their own knowledge, and not of what they have heard from others. *Bauerman v. Radenius*, 7 T. R. 668. *Bauerman* was agent for the person really interested, and had stated in the course of the transaction that the captain was not at all to blame. It was urged that his statement was not admissible as evidence; but the Court held it was, because *Bauerman* was the Plaintiff on the record, and therefore, though not interested, all that he had said or done was evidence. But if the party interested had chosen to be Plaintiff for himself, then it may be inferred from what Lord Kenyon said, that *Bauerman's* letter, written after the time of the transaction, would not have been evidence. In that case, *Biggs v. Laurence*, 3 T. R. 454. was cited: but there the acknowledgment of *Wood* was part of the *res gesta*: a cargo was sent from *Jersey*, a party named *Wood* was sent as the agent to fetch that cargo; his receipt for the cargo was then shewn; it was urged that it was not evidence, but the Court held it to be

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be admissible. That case was extremely different from this. The same doctrine is confirmed by *Grant M. R.*, who, in *Faulstich v. Hastings*, 10 Ves. 127., recognizes *Magford v. Abraham*, and says, if any fact, material to the interest of either party, rests in the knowledge of an agent, it is to be proved by his testimony, not by his mere assertion; if the letter of an agent was offered as testimony of a pre-existing agreement, it was properly rejected. *Johnson v. Ward*, 6 Esp. 48. accords. So, a captain's protest cannot be read in evidence, although the captain is agent of the owner. *Senat v. Porter*, 7 T. R. 158. Neither are these letters the more admissible because they are written to the Plaintiff. If a thing is said to a man, *ore tenus*, and not contradicted, silence is said to give consent; but even that is not evidence in respect of the speaker, but in respect of the conduct of him to whom it is said: but as to a letter, it is not seen what answer is given, or what is said upon receiving a letter, or what is the deportment of him who receives it. If this letter could be read, and a similar letter had been afterwards written, to say the prior information was not true, the Plaintiff might give in evidence the first letter, but could not be compelled to produce the second; so the error would be divulged, but not the correction of it. Nor are the letters the more admissible in evidence because they are appended to the answer in Chancery. *Roe, ex dem. Pellatt, v. Ferrers*, 2 Bos. & Pull. 548. *Chambre J.* held that "where one party reads a part of the answer of another party in evidence, he makes the whole admissible, only so far as to waive any objection to the competency of the party making the answer; and that he does not thereby admit as evidence all the facts which may happen to have been stated by way of hearsay only, in the course of the answer to a bill filed for a discovery." If the account given of a transaction by an agent were to be evidence, there is no man who might

not

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not be ruined by his agent's loose, or, perhaps, treacherous conversation: for it follows that if a man is once constituted an agent, though it be for a particular purpose, he would make every thing that the agent may say, evidence, even if he has it from hearsay, transmitted through any number of persons.

Iens and Vaughan, contra. The case of *Pellat and Ferrars* does not apply; it only decided that although a party admit he has heard any circumstance, that hearsay admission will not avail against himself; and *Fairlie v. Hastings* was decided upon the ground that the person was not *Hastings'* agent. The case of *Bigg v. Laurence* was not answered, nor has it been overruled: and it was decided by *Buller J.* no light authority. In the subsequent case of *Bauerman v. Radenius*, the question was, whether the declarations of the Plaintiff on the record might be given in evidence; and Lord *Kenyon* held they might. And as to *Senat v. Porter*, that was a question whether a protest of the captain, handed over by the Plaintiff, could be received or not; and that may be answered by saying that *quoad hoc* he was not agent. As little do those authorities, that subsequent declarations of an agent respecting a past transaction, are inadmissible, shake the case of the Defendant; for these letters are in fact accounts of sales; and an account of sales would not cease to be evidence because the sale was finished, and was a past transaction. The mere question is, whether the accounts received and transmitted from one agent to another, are not all parts of the *res gesta*, and therefore admissible against the principal. The Plaintiffs have laboured to prove that *Christianford* became the end of the voyage, not from choice, but from absolute necessity. But it is immaterial to the Defendant which was the cause. At the time of the ship's first stopping at *Christianford* it was a matter of necessity,

necessity, but the Plaintiffs afterwards made it a matter of choice, having the prospect of a good market, and the voyage which was at first intended to have terminated at *Amsterdam*, was, by the election of the party, terminated at *Christianfand*; the subsequent confiscation was long after the voyage had terminated, and after the underwriters were thereby discharged from their risk. This being so, the question is, whether the letters representing what was then passing, the conduct then necessary, and the reasons why the Plaintiffs pursued it, are not *prima facie* to be heard. The cause of the loss was the disclosure made by the master, at a time long after these letters were written. The argument used, that not the letter, but the conduct of the person receiving the intelligence, is the evidence, is not applicable here; for what could the receiver of the letter deny here? The letters are used as evidence of the conduct of the principal, that the ship did terminate her voyage at *Christianfand*, he intending that she should there terminate it. The agency of the writers to dispose of the cargo was admitted, and it was not suggested that they had exceeded their authority. This is a matter of great importance in the commercial world, for the attendance of all these witnesses cannot be compelled, scattered as they are in different parts of *Europe*.

Cur. adv. vult.

The court having decided against the admission of the letters in evidence in the case of *Langborn v. Allnutt*, ante 511., which was argued and determined after this argument, they did not again advert to that point in giving their judgment upon this case, which was now delivered by

MANSFIELD C. J. In this case it is not necessary to state all the evidence, which appears to be insufficient to make out

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out the proposition, that the Plaintiffs voluntarily abandoned the voyage, and terminated it at *Christian sand*; and therefore it does not seem that we are authorized to say the decision the jury came too was wrong. First, the ship was detained as soon as she came to *Christian sand*, and the clearance was asked for to *Amsterdam* and refused: nor was there any reason to think the *Danes* would have granted a clearance to any other port which they refused to *Amsterdam*. If the ship chose to go into an hostile port, and incur confiscation, that was nothing to the *Danes*; therefore the construction of that refusal is, that they refused to let the ship go. Then it seems that as the ship was detained almost immediately on her arrival, every thing which afterwards happened must be referred to that detention of the ship. As to the goods being secured by bond, that probably was to secure that the goods should not be carried away by the owner. In *February* the captain betrays his secret, and the goods are confiscated; and, therefore, as it does not appear that at any time, after the ship's arrival there, the goods were under the dominion of the owners, so that the owners might have sailed away with them, we are of opinion that notwithstanding the landing, the policy continued in force, and the underwriters remained liable; the verdict, therefore, in both cases is right, and the rules must be discharged.

Rules discharged.

June 13.

HULL v. BLAKE.

Amendment of
the disseisor's name
refused in a writ
of entry *sur disseisin en le poss.*

BLOSSET Serjt. moved to amend after plea the original writ of entry *sur disseisin en le poss.* and the count thereon, by striking out the words "the elder."

It

It appeared by affidavit that *Nicholas Stead* the disseisor had, at the time of the disseisin, a father living, named *Nicholas*, and at the commencement of the suit he had a son living, whose name was *Thomas*, but which had been supposed to be *Nicholas*, and in consequence thereof the disseisor had been described in the writ and count as *Nicholas Stead* the elder. The tenant had pleaded that *Nicholas Stead* the elder did not disseise the Demandant in manner and form, and the Demandant conceiving that these words would refer to *Nicholas* the father, thought he could not safely proceed to trial without amending his writ.

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The Court refused the application.

PRICE, Demandant; WILLIAMS, Tenant; and
Lord SOMERS and EDWARD CHARLES COX,
Vouchees.

June 13.

THE acknowledgment in this case of *Edward Charles*
Cotls was taken in *Portugal*, and attested by a notary
public, as required by the rule of court, *Hilary* term
14 G. 3., except that it was without a notarial seal.
The parties and the transactions were verified by the
certificate of the *English* consul at *Lisbon*.

Notarial seal
dispensed with in
attesting the taking
of the acknowledg-
ment of a vouchee
in a country where
the notaries do not
use a seal.

Lens Serjt. moved that the appearance might be re-
corded upon an affidavit that it was not the practice for
notaries in *Portugal* to have a notarial seal, in which
case the Court would dispense with the literal observance
of their rule. *Cruttenden v. Bourbell*, ante 1. 144.

Rule absolute.

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June 15.

ADDISON v. GANDASSEQUI.

A., a merchant, purchases goods of *B.*, for the use of *C.*, who is present and selects the goods, and stipulates with *B.* the price and other terms of the purchase. *A.* credits *B.* with the amount, and debits *C.* with the amount and a commission. *B.* credits *A.* in his books and invoices. *B.* cannot recover the price of the goods against *C.*

THIS was an action for goods sold and delivered, and was tried before *Mansfield C. J.* and a special jury, at the sittings at *Guildhall*, after *Michaelmas* term 1811, when it appeared that the Defendant was a member of a *Spanish* trading corporation, called the *Philippine Company*, and was a director of that company, and had come over to *England* to select a large assortment of goods destined for *Lima*. *Larrazabal*, *Menojo*, and *Trotiaga*, a house established in *London*, assisted him in providing the goods, and they having applied to the Plaintiff, with whom they had previous dealings for 20 years, the Plaintiff went by appointment to the house of *Larrazabal* and Co. in the city, with patterns of goods; he found the Defendant there, who examined various patterns, cheapened the prices, mentioned the market for which they were intended, told the Plaintiff he should charge the long price, and he, the Defendant, would himself receive the bounty on exportation, and stipulated for fifteen months credit; he took goods home to his house in *Clarges-street*, and kept them a week to examine, and a clerk from the Plaintiff's house frequently attended on him there to shew and explain the patterns. The Plaintiff received a written order from *Larrazabal* and Co. for a quantity of these goods; after which the Defendant required of the Plaintiff an abatement of *6l. per cent.* on the prices of them, which the Plaintiff refused to make, and the parties were about to terminate the treaty: but at length the Defendant agreed to give the whole price required, and told the Plaintiff he might proceed to execute the order. The Plaintiff and his clerks repeatedly had other meetings with the Defendant, and several other parcels of goods were ordered by *Larrazabal*

zabal and Co., which had been selected by the Defendant at those meetings. *Larrazabal* and Co. referred the Plaintiff to the Defendant for instructions as to the mode in which the goods were to be packed for exportation, and the Defendant gave those instructions. The invoices were all made out by the Plaintiff to *Larrazabal* and Co., and they were debited in the Plaintiff's books for the amount of the long price. *Larrazabal* and Co. in their books debited the Defendant with the amount of the invoices, and also with a commission for purchasing them, of 2½. per cent. on the amount, which was their ordinary mode of dealing with the Defendant, and they credited the Plaintiff with the amount of the invoices. Upon an occasion subsequent to these sales, *Larrazabal* and Co. having applied to purchase some goods of the Plaintiff, the Plaintiff said he thought he had for that time extended his credit far enough to *Larrazabal* and Co., and declined furnishing the goods. *Larrazabal* and Co. gave the orders for packing and shipping the goods, and in their own names, but in pursuance of instructions given by the Defendant, chartered a vessel to *Lima*, in which these goods were conveyed, and instructed the master not to part with the return cargo until payment of the freight and amount of *Larrazabal's* demand on the Defendant. The master did not deliver the return cargo but in consequence of instructions from *Larrazabal* and Co., after a sum of 72,000*l.* had been deposited by the Defendant for their security. One of the partners in their house, which had become bankrupt, being examined, stated, that the house purchased these goods of the Plaintiff on their own credit and account, as they would any other goods for which they had occasion in their trade, and *Larrazabal* and Co. had insured the goods in their own names, for which they had a further commission of a half per cent. The Plaintiff contended that though the credit

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was

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was given to *Larrazabal* and Co., yet that as the Defendant had the goods, he was liable to pay for them; and that this was only the common case of a broker buying for his principal: the principal when disclosed is liable. *Mansfield* C. J. left it to the jury whether *Larrazabal* did act as broker or not, and observed that as the Defendant saw and handled the patterns, and was seen in the business, if he had been the purchaser, most probably the credit would have been immediately given to him, the jury under these circumstances being of opinion that the goods were sold to *Larrazabal* as principal, found a verdict for the Defendant.

Best Serjt. for the Plaintiff, in pursuance of liberty reserved at the trial, obtained, in last *Hilary* term, a rule nisi to enter a verdict for the plaintiff: he cited the cases of *Railton v. Hodgson*, and *Peele v. Hodgson*. (a)

Shepherd

(a) *RAILTON v. HODGSON*, and *PEELE v. HODGSON*.

THESE cases are not reported, but by the brief and notes of the counsel for one of the parties, they appeared to be to the following effect. The former was tried at the sittings after *Trinity* term 1804, and the latter at the sittings after *Michaelmas* term 1804, before *Mansfield* C. J. The facts were, that the Defendant, *Hodgson*, had formerly been a clerk with *Smith, Lindsay, and Co.*, and afterwards set up in business for himself, and had a counting-house for himself at the house of *Smith, Lindsay, and Co.*, which the vendors knew; that he purchased goods himself, and directed the vendors to draw bills upon *Smith, Lindsay, and Co.*, and make out invoices to that house, which was then a house of good credit, and without whose security *Hodgson*

could not have obtained credit and made the purchases. *Smith, Lindsay, and Co.* received from the Defendant a commission of from 2 and half to 5 per cent. upon the goods. The vendors entered the goods in their own books, in the names of *Smith, Lindsay, and Co.*, made out the invoices in the names of, and sent them to *Smith, Lindsay, and Co.*, and drew bills upon them for the amount, which *Smith, Lindsay, and Co.* accepted: the Defendant insisted that he purchased as the agent of *Smith, Lindsay, and Co.*, and in their names, and on their account, as he used to do when in their employ. There was proof, however, of his being the principal, and having bought the goods on his own account: The Plaintiffs obtained a verdict, and

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Shepherd Serjt. in *Easter* term last shewed cause against the rule, contending, in the first place, that the rule could not be made absolute in the shape in which it was moved, for though the Court should think the Defendant was not entitled to a verdict, it was not clear the Plaintiff was; and the rule, if any, should be for a new trial. He further contended that the effect of the evidence was, that *Larrazabal* was not the agent of the Defendant in the affairs, but was in fact the principal to whom the credit was given, for that otherwise the Defendant could never have obtained the goods; for no one would have given credit to a person unknown, and from whom creditors would have no means of compelling payment but by arrest. And he relied on the fact that the Plaintiff being applied to for some other goods, did not refuse to give the Defendant any further credit, but said they would give *Larrazabal* no further credit.

Mansfield C. J., in summing up the evidence, observed to the jury, "that it was admitted these goods were never delivered to *Smith, Lindsay, and Co.*; the Defendant had the goods, and the profits and loss: *Smith, Lindsay, and Co.* were only to have a commission, for which they lent their credit. Suppose a principal authorizes a factor to sell goods, and he sells in his own name, the principal may call upon the vendee for payment. It appeared that *Hodgson* had been a trader from 1793. Suppose *Hodgson* had not been known to be the buyer, he would have been liable; *Smith, Lindsay, and Co.* would only have been nominal buyers. If *Hodgson* had really paid *Smith, Lindsay, and Co.*, it would have depended upon circumstances whether he would be liable to pay for the goods over again; if it would have been unfair to have made him liable, he would not have been so. What pretence was there that the Plaintiffs should be thrown upon the insolvent estate of *Smith, Lindsay, and Co.*, who never had the goods? This was a stronger case than that of a dormant partner. The buyer must be liable, though a third person may also, unless there is an express agreement that the buyer shall not be liable." The jury found a verdict for the Plaintiffs. A motion was made in the following term to set aside the verdict, and have a new trial; but the Court refused it.

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Best and *Vaughan* Serjts. in support of the rule, contended, that as there was no fact in dispute in the case, the Plaintiff was entitled to have the rule to enter a verdict for him. They insisted that in this case *Larrazabal* was the mere agent of the Defendant, which was indicated by his receiving commission. But the Plaintiff, in fact had the security of both parties, for under the written order, which did not affect the real buyer, *Larrazabal* and Co. were liable; and the Defendant was liable, because he had the goods, which raised a sufficient contract: for, by the law of *England*, he who has the goods shall be obliged to pay for them. It had been admitted that when a broker contracts for a principal unknown, when such principal is discovered he may be sued; and so if one partner only contracts, the others, when discovered, are liable. They cited *Railton v. Hodgson*, *Peele v. Hodgson*, and *Powel v. Nelson*, cited by Lord *Ellenborough* C. J. in *Paterfon v. Gandassequi*, 15 *East*, 65. *Waring v. Farrenc*, 1 *Campb.* 85., and *Rymer v. Surwererapp*, 1 *Campb.* 109. The principal could only be discharged by payment, and that payment must be to the vendor, if he is known; if unknown, the vendee must pay the agent; but unless he pays one or the other he is liable. *Wyatt v. Marquis of Hertford*, 3 *East*, 147.

Shepherd, in reply on the cases, contended that the authorities of *Wyatt v. The Marquis of Hertford*, and *Powel v. Nelson*, did not apply: the last was a question of fraudulent payment to the factor by the principal, after knowledge of the factor's not having paid, and notice to pay to the vendor, which Lord *Ellenborough* held to be a payment in his own wrong, for he had no right to pay the factor till he saw the seller paid. The cases of *Railton v. Hodgson*, and *Peele v. Hodgson*, are more like this, but are an *ex parte* account of the cause; and as the rule *nisi* was not granted, the subject

ject was not discussed, and therefore the cases were of less authority.

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The Court took time to consider, and

MANSFIELD C. J. now gave the judgment of the Court. This is a motion made for a new trial, the verdict having been given for the Defendant. The circumstances of the case are very singular. The motion is made on the ground that though the actual vendees of the goods were *Larrazabal* and Co., yet that the verdict ought to have gone against the Defendant, as the person for whom the goods were bought by *Larrazabal* and Co. I left it to the jury to consider whether *Larrazabal* and Co. were acting as factors for the Defendant, or whether the goods were bought by the Defendant himself, who was acting for the *Philippine Company*. In certain cases it would undoubtedly be a monstrous thing to charge the Defendant, but in this case there would be no such hardship, because the Defendant had received the money of the *Philippine Company*. The order was given by the house of *Larrazabal* and Co., and the invoice was made out to them; and the goods were put on board the ship called the *Archduke Charles*, chartered by *Larrazabal* and Co., under bills of lading which compelled the captain to deliver the goods to their order; so that throughout the transaction, from the beginning to the end, the goods are treated as purchased by *Larrazabal* and Co. It was proved that the Defendant was at the counting house of *Larrazabal* and Co., and was shewn a variety of goods. The Defendant objected to the price of the goods, and there was a long treaty respecting the terms of payment for them: what had passed between *Larrazabal* junior and the Plaintiff did not appear at the trial; but it was given in evidence, that the former had met the Plaintiff before the Plain-

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tiff saw the Defendant at the counting house of *Larrazabal* and Co. Directions were given by the Defendant how the goods were to be packed; so it was very clear from all these transactions that these goods were intended for the Defendant, not individually, (although he was a partner in the adventure) but for the use of this company. *Moore*, the captain of the ship, went to *Lima* with the goods, and accounted with the Defendant for the proceeds of the cargo, but not till after he had written to *Larrazabal* and Co., and received orders for him so to do. The orders to the shipper, to the packer, and broker were read; all of which were made out in the name of *Larrazabal* and Co. A witness, *Trotiaga*, from *Larrazabal's* house, proved that he bought these goods for his own house, exactly as he would buy any other goods; that he had been four years partner; he was in the house of the Plaintiff when an order for further goods was proposed, and the Plaintiff said he could not give *Larrazabal* and Co. any further credit. *Larrazabal* and Co. gave credit to the Plaintiff in their books for the amount of these goods, and debited the Defendant. 70,000*l.* had been paid as a deposit, and was now in the Bank, to abide the event of this cause, which I did not understand. I left it to the jury to say whether this were the common case of a merchant here buying for his correspondent abroad, on which he charged a commission, or whether it was the case of a factor buying goods for his principal; and they found for the Defendant. None of the cases that have been cited at all resemble this case; for although it was not said expressly that the Plaintiff did not look to the Defendant, yet, upon all the circumstances of the transaction, it evidently appears that he did not. And if a man selling to another for the use of a third, who stands by and is known, may make the contract with the buyer, without making the third person responsible, certainly this is that case. The cases cited

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cited of *Railton v. Hodgson* and *Peele v. Hodgson*, are very different from this: the partner in the house of *Lindsay* and Co. gave an account, certainly, of a very strange manner of carrying on the trade, but still he made it the trade of *Hodgson*: and there could be no doubt in those cases of the liability of the Defendant. Now in this case, if it had been intended that the sale should be to the Defendant, and that *Larrazabal* and Co. were to be only sureties, the Plaintiff would certainly have debited the Defendant, and taken a guarantee from *Larrazabal* and Co. And only see what a state the Defendant would be in, buying as he does, such an immense amount of goods of the Plaintiff, and other persons! And although it has been objected by the counsel that it is a hard case, that this money getting into the hands of *Larrazabal* and Co. should not find its way wholly to the Plaintiff, of whom the goods were purchased, yet we cannot alter the law of the case, or the nature of the contract, on account of any subsequent events. The insolvency of *Larrazabal* and Co. may make an unfortunate difference in the case as to the consequences, but it will not alter their liability. We, who are called on to set aside this verdict, must, in order thereto, say on this evidence, that *Larrazabal* only was not to be the debtor, but that the Defendant also, who was to buy these goods for the *Philippine Company*, was to be liable: but we can find no evidence to warrant us in that conclusion: the rule therefore must be

Discharged.

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June 19.

YOUNG and Others v. HUNTER and Others.

Where one person purchases goods, and another is afterwards permitted to share in the adventures, the vendors cannot recover against such other person for the price of the goods.

THIS was an action for goods sold and delivered : two of the Defendants, *Hunter* and *Rayney*, had permitted judgment to go by default ; but the other Defendants, *Hoffham* and Co., had pleaded the general issue. The cause was tried before *Mansfield* C. J. at the sittings after *Michaelmas* term 1811, when it appeared that *Hunter* and *Rayney* had purchased goods of the Plaintiffs and other persons, which they intended to ship for the *Baltic* : and the Defendants, *Hoffham* and Co., who were not otherwise partners of *Hunter* and Co., were afterwards allowed to join in the adventure, and to have a fifth share upon the goods being put on board. The Plaintiffs knew nothing of *Hoffham* and Co. but sold the goods to *Hunter* and Co. only. The question was, whether this was the case of common sleeping partners.

MANSFIELD C. J. directed the jury to find a verdict for the Defendant, with liberty for the Plaintiff to move for a new trial : accordingly in *Hilary* term last, *Shepherd* Serjt. obtained a rule nisi, on the ground that *Hoffham* and Co. having had the benefit of the goods, were liable to pay for them, although they were originally furnished to *Hunter* and Co. only.

Lens and *Vaughan* Serjts. now shewed cause against the rule :

Shepherd and *Best* Serjts. endeavoured to support it.

MANSFIELD C. J. continued of the same opinion as at the trial.

HEATH J. The proposition of the Plaintiffs counsel, that if it be shewn that at any one period of the transaction there were a partnership subsisting, it was therefore to be inferred that there had been a partnership in the particular original purchase, is wholly unfounded.

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HUNTER.

CHAMBRE J. was of the same opinion, and

GIBBS J. The only possible ground for a new trial would be if the Plaintiffs could shew that at the time of the purchase of the goods from the Plaintiffs, *Hoffham* and Co. and *Hunter* and *Rayney* were concerned in that purchase on their joint account: now the only evidence given of it, was, that at the time of the shipment they were so interested. How long before the shipment the purchase was made, does not appear; but it is not to be inferred from *Hoffham* and Co. being interested at the time of the shipment, that they were interested at the time of the purchase: it is for the Plaintiffs, who seek so to implicate them, to make it out by evidence. I am by no means of opinion that there may not be a case where two houses shall be interested in goods from the beginning of the purchase, yet not be both liable to the vendor: as if the parties agree amongst themselves that one house shall purchase the goods, and let the other into an interest in them, that other being unknown to the vendor; in such a case the vendor could not recover against him, although such other person would have the benefit of the goods. On this and other reasons, I am of opinion the present verdict ought not to be disturbed.

Rule discharged.

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June 16.

MULLINS Demandant,

Tenant,

Vouchee.

Under the rule of Court, *Hilary 14 Geo. 3.* attornies of the Court of Great Sessions in *Wales* are not competent to take the acknowledgment of a warrant of attorney for suffering a recovery.

BEST Serjt. moved that this recovery might pass. There were five parties, three of whom resided at *Bath*, and two in *Wales*. The proceedings as to the three at *Bath* were regular; but the persons making the affidavit of the acknowledgment of the warrants of attorney of the two who resided in *Wales*, were not attornies of either of the courts at *Westminster*, but only attornies of the Court of Great Sessions in *Wales*. He contended that this was sufficient, because there were no attornies of the courts of *Westminster* to be found in *Wales*, and therefore the rule of *Hil. 14 Geo. 3.* did not apply, and he relied on a precedent of a recovery having been suffered in 1802, by Lord *Kirkewall*, which was permitted by *Chambre J.* at his chambers, to pass, although the warrant of attorney was acknowledged in *Wales* under similar circumstances. [*Chambre J.* That was upon very strong affidavits that there were no attornies of the courts of *Westminster* residing in the neighbourhood.] **BEST** Serjt. It appears here by the affidavit, that search was made, and none could be found.

GIBBS J. That is a very good reason for altering the rule of court, but not for breaking through it, as it is now established.

HEATH J. This is a nullity, it is no warrant of attorney, unless it be taken according to the rule of this court.

CHAMBRE J. observed that there was another objection: the affidavit did not state that the party knew the

the warrant of attorney was intended to pass their estates tail.

1812.

MULLINS

v.

Best. It shews in the introductory part of the affidavit, that he knew it was for the purpose of suffering a common recovery.

Per Curiam, That is not enough.

The Court refused the application.

MAC GEORGE and Others, Assignees of VANDERAA
a bankrupt, v. BIRCH.

June 16.

THE Defendant, who was the sheriff, had taken goods which had belonged to the bankrupt, under an execution at the suit of *Cohen*: the Plaintiffs had given the sheriff notice that they claimed the goods, and he had thereupon apprized *Cohen*, and requested him either to authorize the delivery of the goods to the assignees, or to give the sheriff an indemnity, both of which *Cohen* had refused. The Defendant had thereupon desired the Plaintiffs to accept the goods, and to give him an indemnity, which they also had refused, and had commenced this action.

If the assignees of a bankrupt claim goods taken in execution, and the assignees and the Plaintiff in the execution both refuse to indemnify the sheriff, the Court will interfere to protect him.

Best Serjt. had on a former day, on behalf of the sheriff, obtained a rule nisi, that upon delivery of the goods by the sheriff to the Plaintiffs, the Plaintiffs should be compelled to give him an indemnity.

Shepherd Serjt. on behalf of the Plaintiffs, opposed this, on the ground that the Plaintiffs had only collected 100*l.* assets of the bankrupt, and had already paid 65*l.*

1812.
 MAC GEORGE
 v.
 BIRCH.

for his commission, and whatever further funds they might collect, they were bound to distribute forthwith among the creditors, and it was wholly uncertain when, or whether at any time, *Coben* would rule the Sheriff to return the writ, or otherwise contest the right to the goods with the sheriff, so as to decide the merits, and the Plaintiffs would therefore become personally liable out of their own effects to the consequences of this indemnity, and could neither influence nor foresee the determination of that liability. If *Coben* was substituted as Defendant, the sheriff ought to continue as security to the assignees for the costs of the action.

Vaughan Serjt. appeared for *Coben*, and offered that he should become either Plaintiff or Defendant to try the question; but required that the Plaintiffs should give him security for the costs.

Best for the sheriff, endeavoured to support his rule, and claimed his poundage. The Court had a competent jurisdiction to protect the sheriff, and would exert it.

The Court observed, that if the sheriff were to file a bill of interpleader, he would not be liable to the costs of the action against *Coben*; and directed that the declaration should be amended by inserting the name of *Coben* as Defendant instead of that of the sheriff, and that it should be so delivered to *Coben*; that he should plead *insolvent*, and admit upon the trial, the taking of the goods: the sheriff was to be discharged from this action and all other responsibility either to the Plaintiffs or *Coben*, upon selling the goods and bringing the money into court, and he was directed to apprise the parties of the time and place of sale: his right to the poundage would depend upon the question, whether the execution was warranted; if the assignees succeeded in the action, the sheriff would be a wrong doer and not entitled to poundage.

poundage. The Court could not in any case make the assignees of a bankrupt give security for costs, and there was clearly no reason to ask it in this case.

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MAC GEORGE
v.
BIRCH.

BROWN and Another v. HOLT.

June 16.

*P*EST Serjt. moved to set aside a judgment which the Defendant had confessed, and the warrant of attorney, and execution levied, upon the ground that the Plaintiffs were, as to this debt, which was for money lent to the Defendant to furnish a public house, trustees for the *Golden Lane Brewery*, an association of persons who had opened a subscription for shares, and had made them transferable, and therefore were guilty of a nuisance within the stat. 6 G. 1. c. 18.; and although their professed object was to effect the manufacture and sale of wholesome beer, yet the Court could not look to the object, but were bound to hold it a nuisance, the shares being made transferable.

The Court would not decide the question whether the *Golden Lane Brewery* were a nuisance within 6 G. 3. c. 18. upon a motion to set aside a judgment confessed to them.

The Court seemed to doubt whether it were not a question for a jury to consider, whether the association were in fact beneficial or not, and referred to *Rex v. Dodd*, 9 *East*, 516. and *Rex v. Webb*, 14 *East*, 406., but would give no opinion upon it. They refused however, in a matter of so great importance, considering how much property was at this time embarked in speculations of a like nature, to entertain the question upon this summary proceeding: if the Defendant would make the like motion upon producing a record of the conviction of the Plaintiffs or their *cestuique* trusts upon an indictment for a nuisance, the Court would then decide how they should dispose of this judgment.

Rule refused.

1812.

June 16.

ANONYMOUS.

The Court will not grant a one-day rule with only one day's notice to discharge an insolvent debtor, though it is prayed for on the last day but one of the term.

VAUGHAN Serjt. moved on this day, which was the last but one of the term, that an insolvent debtor might be brought up to be discharged on the morrow, upon only a one-day rule, and with only one day's notice. After some discussion and reference to the act, the Court were unanimous that the rule ought not to be granted.

Rule refused.

June 17.

MOODY v. STRACEY.

The Court will amend a pending a writ of error clerical mistake in the declaration upon which the Defendant relied for his matter of error.

VAUGHAN Serjt. moved pending a writ of error to amend the declaration, by inserting the letter *t* in the Defendant's name; in the declaration delivered, it was written *Stracey*, which would be error.

Clayton Serjt. opposed the amendment, unless on the terms, which, he contended, were his right, according to the universal practice, of pleading *de novo*. If these amendments are made, the party ought not to be put in a worse situation by them: the want of this letter was the ground of the writ of error, and that ground ought not to be struck from under the Defendant.

HEATH J. In *Rex v. Wilkes*, 4 *Bur.* 2527. an amendment was made in the information two or three days before the trial; and even after transcript errors are often amended.

Rule absolute for the amendment, upon payment of the costs of the motion and of the amendment, and the costs of the writ of error.

LANE, Demandant; PEWTRISS, Tenant; BENNET
and Wife, Vouchees.

1812.

June 17.

HERWOOD Serjt. moved that the appearance might be recorded, and the recovery pass, upon an affidavit being procured of the day on which the acknowledgment was taken: it being left blank in the acknowledgment, thus "the —— day of *June*."

The day upon which an acknowledgment was taken, which was left blank, permitted to be supplied by affidavit.

Rule absolute.

BUZZARD, Demandant; WARE, Tenant; BAXTER,
Vouchee.

June 17.

VAUGHAN Serjt. moved that this recovery might pass, and the tenant's appearance be recorded as of *Hilary* term last. The parties were all alive, and all the papers were duly perfected, and were sent in due time in *Hilary* term to the agent in *London*, but he was so much pressed with business, that he did not produce the papers in court, as he might have done, within *Hilary* term, but appeared the first day of the next term. It would occasion great expence to the parties to deny them this indulgence, and would endanger their title, lest the parties should die before another appearance was procured: it had been the practice to allow it, as the officers would state.

Where the tenant should have appeared in *Hilary* term, and he did not appear till *Easter* term, the Court would not permit the appearance to be entered as of *Hilary* term.

MANSFIELD C. J. Although it does not appear that in the present instance it would do any harm, it is to be sure, an extraordinary stretch of the practice of the court, if when a man is required to appear in one term, and he appears in another, the Court should record the appearance as of the former term.

HEATH J. never remembered an instance of its being done.

CHAMBER

1812.

BUZZARD

v.

FAXTER.

CHAMBRE J. There is not a shadow of a reason for its being done here.

GIBBS J. As to the expence and danger to the parties, it concerns those who conduct this sort of business, to see that it is conducted with more accuracy. Perhaps it would be better if indulgences of this description were granted in no case: but certainly it should be done but very rarely; and this is clearly not one of the cases: in the preceding case the appearance had been duly made, only some of the papers were irregular.

Rule refused.

June 17.

SHAW, Demandant; WARE, Tenant; and CLULOW
Vouchee.

In a recovery, the attorney upon the record cannot be a commissioner for taking the acknowledgement of the warrant constituting himself the attorney.

HEYWOOD Serjt. moved that this recovery might pass. It had been objected that two of the commissioners who were named in the *dedimus potestatem*, and before whom the acknowledgement was taken, were the attorneys for the vouchee, but he conceived there was no rule regulating the practice in this respect.

MANSFIELD C. J. It is absurd; the intention of the proceeding is, to satisfy the Court that these persons have authority to appear, and the evidence that they have authority to appear, now contended for, is, that they themselves say so. It is mere nonsense that the attorney's own assertion that he is attorney for the Vouchee should be received as evidence of the fact.

GIBBS J. I was told at chambers that this was a mere matter of form; but upon considering it, I found it was not so. It might greatly facilitate frauds.

Heywood then moved that a new *dedimus* might issue, and that on its being returned the recovery might pass: but this was also refused.

1812.

June 17.

CLARKE v. SIMPSON.

BEST Serjt. had obtained in this term a rule *nisi* for judgment as in case of a nonsuit, for not having proceeded to trial at the *Chelmsford March* assizes, in pursuance of notice.

A Defendant who moves for costs for not proceeding to trial, cannot have judgment as in case of a nonsuit for the same default.

Onslow Serjt. shewed cause, upon the ground that the Defendant had in *Easter* term last obtained a rule for costs for not proceeding to trial; under which rule the costs were taxed and allowed by the prothonotary; and that the Defendant had since ruled the Plaintiff to enter the issue, which had been accordingly entered; and that the Defendant could not, after costs for not proceeding to trial, now have judgment as in case of a nonsuit for the same default; having elected the former remedy, he could not have both; *Ogle v. Myffe, Barnes*, 316. The case of *Dorant v. Rouvellet, alias Romney*, 2 *New Rep.* 247., which states, that they may both be moved for in the same term, could not be law.

Best, contra, relied on the case in the *New Reports*, by which it is taken for granted that this motion might be made in a subsequent term; but the doubt there was, whether it could be made in the same term, which was decided in the affirmative. The distinction is, that if a party moves for judgment as in case of a nonsuit, which includes the whole, he cannot afterwards move for costs for not proceeding to trial, which is a part of the same whole. But after moving for costs for not proceeding to trial, the Defendant must be enabled to move for judgment as in case of a nonsuit, in order to oblige the Plaintiff to go on to trial; or otherwise he may be hung up for ever.

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CLARKE
v.
SIMPSON.

HEATH J. There is certainly some misapprehension in the case as reported in the *New Reports*: either of the court or in the reporter. The case say it was so decided on consultation with the officers, and they all now say they never so understood the practice.

MANSFIELD C. J. I think we must decide according to the understood practice of the court.

CHAMBRE J. concurred in thinking that the case of *Dorant v. Rouvellet* was wrong.

GIBBS J. Putting that case in the *New Reports* out of the question, there is no difficulty in it. A man may make his election whether he will take the whole or part only; the effect of the motion for costs for not proceeding to trial is included (a) in the motion for judgment as in case of a nonsuit: if the latter motion is made, the former is thereby rendered wholly unnecessary: and if the Defendant wished for the whole effect, he might have attained it at once by making the latter motion: if the Defendant makes the first only when he might have made either, it must be taken to be an election to obtain that part only, for if he might afterwards make the other motion he would put the Plaintiff to double costs. I therefore think that the practice ought to be, that if the Defendant makes the first motion, he shall not, without subsequent default in the Plaintiff, make the second, either in the same term or in the subsequent term; and that the case in 2 *New Rep.* must have been misunderstood by the reporter.

Rule discharged, but without costs, this being a moot point.

(a) Because this Court will make it a condition of discharging a rule nisi for judgment as in case of a nonsuit, that the Plaintiff shall pay the Defendant the costs of not proceeding to trial before: *secus* in *B.R.*

PEARSALL v. SUMMERSETT.

1812.

June 17.

THIS was an action of debt for 1500*l.* on a bond, which, on oyer, appeared to be entered into by the Defendant, who was a surety, and *William Winter* the principal, jointly and severally, with a condition, which, reciting that at the request, and for the account and accommodation of *Winter*, the Plaintiff had accepted drawn, or indorsed, negotiated and paid sundry bills of exchange, several of which were still outstanding and unpaid, and in order to indemnify and save him harmless in respect thereof, and from all losses, costs, charges, damages, and expences, the Defendant had consented and agreed to join with *Winter* in manner hereinafter mentioned, was, that if *Winter*, his heirs, &c., should at all times thereafter pay to the Plaintiff upon demand, all such money as the Plaintiff already had, or as at any times or time thereafter he should or might advance, expend, or pay, to, or for the use, or on the account of *Winter*, or by his order, or at his request, and also all such money as the Plaintiff then was, or at any time thereafter should or might become, or be subject or liable to pay, by virtue or upon account of his having accepted, and engaged himself for the payment of any bills of exchange, promissory notes or drafts, at the request, for the use, or on the account of *Winter*, and whether the said bills, notes, or drafts should be then (a) due and payable, or only coming due and payable, together with all costs, &c. which the Plaintiff then was, or should thereafter pay, sustain, or be liable for, about, or respecting the same bills, notes, drafts, payments, acceptances, or negotiations, or any or either of them, by any means howsoever; or in case *Winter* should neglect, decline, or refuse so to do then, if the Defendant should pay to the Plaintiff so much and such part of all such money as already had

The extent of the condition of an indemnity-bond may be restrained by the recitals, though the words of the condition import a larger liability than the recitals contemplate.

(a) So in the bond.

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been or thereafter should be advanced or paid by the Plaintiff, to or for the use, by the order, at the request, or on the account of *Winter*, or which the Plaintiff should or might be subject to, or liable to pay, by virtue of any such bills, notes, drafts, or engagements as aforesaid; and moreover should pay unto, and sufficiently keep indemnified the Plaintiff against all such costs, charges, damages, and expences whatsoever, which he should or might bear, pay, sustain, be liable, or put unto, for, or by reason of his having accepted or discounted any bills of exchange, drafts, or promissory notes, or of his having paid any money as aforesaid, to, or for the use, and at the request, by the order, or on the account of *Winter* as aforesaid, then the obligation should be void. The Defendant pleaded performance by *Winter*, pursuing the terms of the condition so far as related to him; and that the Plaintiff had not been damnified. The Plaintiff replied by assigning for breach, that he, after the making of the bond and before the suing out of his writ, on divers days did advance, and pay to, and for the use, and on the account of *Winter*, and by his order, and at his request, divers sums amounting to 1300*l.*; and averred that both *Winter* and the Defendant had notice, and refused to pay. And for a further breach, he averred, that after the making of the bond, and before the suing out his writ, on the 1st day of *January* 1812, he had become, and was subject and liable to pay divers sums amounting to 1500*l.*, by virtue of his having accepted and engaged himself for the payment of divers bills of exchange, at the request, for the use, and on the account of *Winter*, whereof *Winter* had notice, but did not on demand repay those sums, and that the Defendant would not upon notice and request pay to the Plaintiff the money which he was so subject and liable to pay, but refused so to do, whereby the Plaintiff afterwards, and before the suing out of his original writ, was called upon to pay, and did necessarily pay to the holders of the said bills divers sums, amounting to

1250*l.*,

1250*l.*, for and by reason of his having accepted the said bills, together with certain costs, charges, and expences, for, about, and respecting the same bills, amounting to 50*l.*, and by means of the premises the Plaintiff had been, and was damnified to the amount of the sums so paid by him, and had been, and was still subject and liable to pay to the holders of the said bills divers other sums amounting to 200*l.*, by reason of his having accepted the said bills. To the breach first assigned, the Defendant rejoined, that the sums in that breach alleged to have been advanced and paid by the Plaintiff, were not advanced and paid upon, or by reason, or in discharge of any bills accepted, drawn, or indorsed, negotiated, or paid by the Plaintiff before the making of the bond; but were so advanced and paid upon, and by virtue, and in discharge of certain bills respectively accepted, drawn, or indorsed, negotiated, or paid by the Plaintiff after the making of the bond. And to the last breach he rejoined, that the Plaintiff did not become, nor was subject or liable to pay the money in that breach mentioned, by reason of his having accepted and engaged himself for the payment of any bills which were drawn before the making of the bond; but that the bills of exchange, by virtue of his having accepted and engaged himself for the payment of which, he became liable to pay the money in that breach mentioned, were drawn after the making of the bond. To both these rejoinders the Plaintiff specially demurred, and assigned for causes that each of them was a departure from the Defendant's plea, inasmuch as the Defendant had therein alleged that *Winter* paid to the Plaintiff all the money which the Plaintiff had paid, and was subject and liable to pay, according to the effect of the condition; and although the Plaintiff in the breach first assigned, had alleged that *Winter* did not pay the sums in that breach mentioned to have been advanced and paid by the Plaintiff, and in his last breach had alleged that *Winter* did not pay the several sums which it was therein alleged that the

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Plaintiff was subject and liable to pay, according to the effect of the condition, yet the Defendant had not in his rejoinder relied on such payments by *Winter*, as he had before done in his plea, but had departed therefrom and abandoned his defence arising from such payment, and had introduced entirely new matter as his defence to the action; and also for that although the Plaintiff in each of the breaches had alleged matter upon which a material and proper issue might have been taken; yet the Defendant's rejoinder had not tendered or taken any issue upon the facts therein alleged, and had introduced new collateral matter, wholly unconnected either with the plea in bar, or the replication; and also for that the Defendant had in his rejoinder introduced matter irrelevant and wholly immaterial to the question of the liability of the Defendant upon the bond. The Defendant joined in demurrer on both breaches.

Shepherd Serjt. in support of the demurrer, contended that the condition expressed an indemnity against three distinct sources of detriment. 1. Such monies as the Plaintiff had paid before the making of the bond. 2. Such sums as the Plaintiff might pay after the making of the bond, at the request or for the account of *Winter*; and these payments might be either by reason of liabilities contracted before the making of the bond, or of engagements made after the date of the bond; but the words were so large that they included both descriptions of payment. 3. Such sums as the plaintiff might become liable to pay by reason of his having accepted bills. The first and the last branches of the condition were sufficient to secure the Plaintiff against the consequences of all advances and bill transactions which had taken place before the date of the bond; and although the object recited in the preamble was often called in aid to restrain the generality of words in the condition, which were somewhat larger than that object required, yet that rule did not apply where it distinctly appeared,

as here it did on the face of the condition, that it was intended to provide also for an ulterior object, the future transactions between the parties.

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Lens Serjt. contrd. The replication is bad, because it assigns as breaches, matters which were not within the condition of the bond, and the rejoinder is good, because it limits the issue to the only descriptions of loss which fall within that condition. Both the expressions, "shall hereafter pay," and "by reason of having accepted bills," are large enough to comprehend, and if such had been the meaning of the parties, they are consistent with, but do not necessarily import an indemnity for future transactions. But the recital explicitly states the extent of the contract, viz., that the Plaintiff had accepted bills, and that the Defendant had engaged to indemnify him in respect thereof, that is, in respect of the bills then already negotiated. Tautology may be well conceived and permitted to exist, without straining the sense to give a distinct meaning to every word. Lord *Arlington v. Merricke*, 2 *Williams's Saund.* 4 ed. 411. establishes the principle, that although the words of a condition may be much larger than the contract recited, yet that they shall be restrained by the recital to the effect of that contract. And there is good reason for such a construction: for it widely differs the situation of a surety, whether he is to be responsible only for past, or also for future transactions: he might have some knowledge of the state of securities outstanding at the time of his engagement, and of the competence of the principal to discharge them, but of the future, unlimited, he can know nothing. The words "shall become liable," are not used here in their strict legal acceptance: they refer to accommodation-bills, which although the Plaintiff had accepted, he did not expect to be called on to pay, the drawer having engaged to provide funds.

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Shepherd, in reply. Since the engagement is limited in amount to the extent of the penalty, the argument of inconvenience from its being unlimited in point of duration, is of no weight. This case is materially distinguishable from those of Lord *Arlington v. Merricke*, and *Horton v. Day*, *cit.* 2 *Saund.* 414, which were limited to the performance of the duties of a specific office. This condition speaks of money expended for *Winter* by his order, at his request, terms which cannot possibly be applicable to money paid by the Plaintiff in discharge of a bill of exchange previously accepted by himself. These words can have no meaning at all unless the indemnity extended beyond the recited contract, and if it extends to any thing more than the bill transactions, even to money lent by the Plaintiff to *Winter* before giving the bond, there is an end of the argument for restraining it to the extent of the recital. None of the cases go to the length of expunging from the condition words which cannot be referred for a meaning to the terms of the recital.

Cur. adv. vult.

Mansfield C. J. now delivered judgment. It is unnecessary to state the pleadings: the only question is, whether the Defendant has made himself liable for any transactions between the Plaintiff and *Winter* beyond those that had taken place previous to the giving of the bond. On the one hand it is contended, that the Defendant became liable only for all bills given, accepted, &c., previous to the bond being given; on the other, the Plaintiff, contends that the Defendant's engagement extends to all transactions entered into, as well before, as after that period. Which of these is the right construction, entirely depends upon the condition of the bond, (which his Lordship here read.) We cannot read this without saying that whatever was the intent of these parties, it is inaccurately expressed. First, as to "all losses, costs, charges, damages, and expences," mentioned
in

in the recital, they are not confined to any source or cause whatsoever. With respect to the next clause, namely, the engagement to repay on demand "all monies which the Plaintiff had paid or thereafter should pay to the use or for the account of *Winter*, or at his demand or request," (coupling this with the recital of the object of the condition, that is, to indemnify the Plaintiff against all bill transactions incurred previous to the bond,) if the condition had stopped there, it must have been confined to payments made on account of those bills only, to which the Plaintiff had become party before the giving of the bond. Then come the subsequent words, "all such sum or sums as the Plaintiff should or might thereafter become liable to pay in consequence of his having accepted or engaged for the payment of any bills." These words might by possibility mean all sums which he might be liable to pay by reason of his having accepted any bills whether before or after the giving of the bond, at any time whatsoever; but coupling them with the recital, I think they must be confined to payments on bills which he had accepted previous to giving the bond; and if this be allowed, there will then be no difficulty in confining all the subsequent words, however general, to bills given before the giving of the bond; and therefore coupling the whole with the recital, it appears the clear meaning of the parties, that the Defendant should become surety only for the consequences of past transactions. If the intention had been to make the Defendant liable for future transactions, it would have been the most important object of the bond; for though the past transactions might have exceeded 1500*l.*, it is most probable, as the penalty is limited to that sum, that they did not: probably not so much: it was also more likely that the principal should clear off those, than future transactions; therefore it is very improbable that the parties contemplating this the most important branch of the indemnity, should not even have alluded to it in the recital, and which it would there-

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1812. therefore be of more consequence to state, than the other, wherein there is not a single word, that, in its proper signification, relates to future transactions. A guarantee is not to be held liable beyond the express terms of his contract, and as we therefore think that the strict and true interpretation of this condition does not extend the indemnity beyond the liability for past transactions, upon this ground the judgment upon this demurrer, must be entered

For the Defendant.

REGULÆ GENERALES.

Wednesday, June 17th. IT IS ORDERED, That from henceforth all Fines shall be left at the Office of the Chirographer within Fourteen Days after the same shall have passed the King's Silver Office, and that all Fines now remaining in the King's Silver Office shall be carried to the Chirographer's Office within Two Months from this Day, and that a neglect to comply with this rule, shall be deemed a contempt of this Court.

IT IS ORDERED, That in future no Cause shall be tried by a special Jury in this Court, in *Middlesex* or *London*, unless the Rule for such Special Jury shall be served, and the Cause marked in the Marshal's Book, as a Special Jury Cause, Two Days previous to the Adjournment Day in *Middlesex* or *London* respectively.

J. MANSFIELD.

J. HEATH.

A. CHAMBERLAIN.

V. GIBBS.

C A S E S

ARGUED AND DETERMINED

IN THE

1812.

Courts of COMMON PLEAS,

AND

EXCHEQUER-CHAMBER,

IN

Michaelmas Term,

In the Fifty-third Year of the Reign of GEORGE III.

STONE v. STONE.

November 9.

SHEPHERD Serjt. moved that a fine might be permitted to pass, upon an affidavit that the acknowledgments were taken in *April* 1811, and that the parties were all alive on the third day of the present month; and that the reason of the delay had been, not that the deponent, who was the attorney employed, had forgotten the business, but that he had mislaid the papers, and they had become intermixed with others of his papers, and by reason thereof had only very lately been found again.

If an attorney employed to levy a fine, mislays the papers, and does not complete it within the time required by the rule of Court *Trinity term* 54 G. 3. the Court will not permit the fine to be afterwards perfected, but will, if all the parties

be alive, direct a new fine to be levied at the expence of the attorney.

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The Court referred to the rule promulgated in the last term, for completing fines, and refused the application; accompanying their refusal with a direction, that as all the parties were still alive, so that there was no obstacle to the levying a new fine, a new fine should be forthwith levied at the expence of the attorney who had mislaid the papers.

November 9.

DAVIS v. DODD.

Payment of a bill of exchange cannot be enforced without producing the bill.

An express promise to pay the contents of a lost bill of exchange, if given without some new consideration, is void.

THE Plaintiff declared upon a bill of exchange for 96l. 9s. drawn by *Allen*, to his own order, and accepted by the Defendant, and indorsed by *Allen* to the Plaintiff. There were also the usual money counts. Upon the trial at the *Maidstone* Summer Assizes 1812, before Lord *Ellenborough* C. J. it was proved that the witness had lost the bill out of his pocket, whereupon, when the bill became due, he applied to the Defendant, stating the circumstance, and requesting him to pay the bill, which until the time of the action had never been presented for payment by any other person, and the Defendant repeatedly and expressly promised to pay it. Lord *Ellenborough* was of opinion that as the Plaintiff had not presented the bill for payment to the Defendant, and as the bill was not produced at the trial, the Plaintiff could not recover in this action, and directed a nonsuit.

Best Serjt. now moved to set aside the nonsuit, and have a new trial: he contended, that the express promise to pay the bill was upheld by the consideration of the moral obligation, to which the Defendant was subject, to pay the sum due on his acceptance.

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The Court denied that there was any moral obligation on the Defendant to pay this sum to the Plaintiff, who by his negligence had exposed the Defendant to the danger of being compelled to pay the bill when produced in the hands of another holder. It was quite clear the Plaintiff could not recover in this action. If he could recover at all upon this promise, which they much doubted, it must be in an action upon the special undertaking. The party might have proceeded to enforce the giving of a new bill under the statute, and that seemed to be his only course. The promise contained in the bill, is the equivalent given for the consideration paid for the bill. No new consideration had been subsequently paid to sustain this new promise, which was therefore *nudum pactum*, and could not be enforced.

1812.

DAVIS

v.

DODD.

Rule refused.

VINCENT and Others, Assignees of DOWSON v. PRATER. *November 9.*

TRÖVER by the assignees of a bankrupt for bills of exchange, contended to have been delivered to him by the bankrupt after an act of bankruptcy. At the trial before *Mansfield C. J.* at *Guildhall*, at the Sittings after *Trinity* term 1812, two transactions were proved by the Plaintiffs, and contended to be acts of bankruptcy. A creditor called at the house of the bankrupt one morning, while the bankrupt was out, and said, he had plenty of bills, but he wanted some cash to pay his workmen, and he must and would have 50*l.* or 60*l.* that

A trader left a message at his house, for a creditor, who had in his absence called for a debt, that he could spare no money, and would not pay him that day, and would go out of the way and stay till dinner time. Held that it was for the jury to consider,

whether he absented himself to delay a creditor; and this evidence warranted their conclusion, that he did not.

So, where he absented himself from his house, where his creditors were, to avoid irritation and harsh language.

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day : he then went away, leaving word that he should call again. *Dowson* soon after coming in, upon hearing this message delivered to him, directed his clerk to tell the creditor, when he called again, that he could not spare the money and would not let him have it ; and he added, that he, *Dowson*, should go out of the way and should not return home till dinner time. He went out accordingly, and the creditor soon after returning, the clerk communicated to him the whole of what *Dowson* had said. *Dowson* came home to dinner that day : the creditor did not call again at dinner time. The other transaction was, that *Dowson* being embarrassed in his circumstances, at the instance of three principal creditors, appointed a day for them to come to his counting house, and examine his books : early on that morning he left his home, and went to a public house in the neighbourhood, whither he directed his clerk to bring him from time to time intelligence of what passed with the creditors ; and he assigned as a reason for so doing, that he expected that when the creditors found how bad his affairs were, they would be irritated, and if he were present, some harsh language would pass, and possibly they might be induced to arrest him. And the Plaintiffs contended that this was an absenting himself for the purpose of delaying his creditors. The jury found a verdict for the Defendant.

Best Serjt. now moved to set it aside and have a new trial.

The Court held, that as to the first transaction, the case had gone to a jury on a point that might be fairly raised, whether *Dowson* went out with intent to delay his creditor or no ; and upon the verdict they had given, it must be presumed, they had found that he had not : the Court could not say the conclusion was wrong, they rather thought it was right ; a man who intends to delay

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a creditor, does not usually direct his servant, "tell him I have been at home, and I cannot and will not pay him." There was not the least idea of any fear of arrest, or of process being issued against him. Still less does a man who wishes to delay his creditor name the hour when he shall return home; and to set aside the conclusion of the jury, the evidence ought strongly to present the contrary inference. As to the second transaction, *Dawson* assigned the true cause of his absence, that he quitted his house to avoid altercation.

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VINCENT
v.
PRATER.

Rule refused.

WARIN and Another v. SCOTT.

November 9.

THIS was an action upon a policy of insurance, dated the 21st of Sept. 1807, and effected by the Plaintiffs, upon a voyage at and from *Portsmouth* to *Amsterdam*, upon prize wines, valued at 800*l.*, by the ship *Drie Vrienden*. The declaration stated the interest to be in *J^r. Van Eyck*. Upon the trial of this cause at the *Surry* Summer Assizes 1812, before Lord *Ellenborough* C. J. the parties made the following admissions; the Defendant's subscription to the policy, and to a memorandum at the back thereof, dated the 7th of November 1807, allowing the vessel to proceed from *Portsmouth* to *Gottenburgh* and *Amsterdam*; the wines were shipped by the Plaintiffs on board the *Drie Vrienden* on account of *Van Eyck*, and he was interested therein as averred in the declaration; he was a native of *Holland*, and was domiciled at *Amsterdam*, and at the time of the purchase of the wines insured, was resident in this country under the King's licence, dated the 28th of May 1806, and purporting, in pursuance of the statute, to grant unto *F. Van Eyck*, aged 37, a native of, and lastly resident

If an alien enemy, commorant here under the King's licence to reside here, purchases goods for exportation, the exportation thereof by him, after his licence to reside has ceased, is not protected by a licence to trade, also obtained after his licence to reside has ceased, and authorizing the exportation of the identical goods by B. and K. or other British merchants.

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 SCOTT.

at *Amsterdam*, known to *Messrs. Warin, Fleischman and Jutting of Devonshire Square, Bishopsgate Street*, and residing there, his Majesty's licence to reside at *London*, and within 13 miles thereof in the county of ———, from the date thereof for the term of three months, with the restriction, and on condition, that he should communicate every change of his residence to the Alien Office. Upon this licence were indorsed various extensions, one whereof permitted him to travel to "*Birmingham* on business," another "to *Looe* in *Cornwall*, and to attend sales of prize wines there for 14 days," and the time was altogether extended to the month of *July 1807*. *Van Eyck* himself, at a sale of prize wines, selected these, but they were paid for by the Plaintiffs at his request. The wines insured were shipped in *August 1807*, and were intended to be exported under a licence from the King, dated the 31st *July 1807*, granted to *Messrs. Van Buuren and Kanningeijffer* on behalf of themselves and other *British* merchants, but procured by them in consequence of orders from the Plaintiffs, as the agents of *Van Eyck*, and "permitting three neutral ships to navigate freely under the several flags therein named from or to any port of *Holland*, to or from the *United Kingdom* and to import such quantity of (*inter alia*) prizes wines, as might be specified in their" (*i. e.* the ships) "bills of lading; and that licence was to remain in force for six months, and to be revocable," &c. It provided also, "that *Messrs. Van Buuren and Kanningeijffer* on behalf of themselves and other *British* merchants, to whom his Majesty granted that licence, should cause the same to be delivered up as therein mentioned." That the Plaintiffs, as the agents of *Van Eyck*, also procured another licence dated the 15th of *December 1807*, which recited that it had been represented to his Majesty by *Messrs. Warin, Fleischman and Jutting*, that they intended to export a cargo of prize wine from *Portsmouth* to *Holland* on board the

the neutral ship *Drie Vrienden*, as long ago as *August* then last, by virtue of the licence dated 31st *July*, but that owing to the political events on the continent, the exportation did not take place, and the wine still remained at *Portsmouth*, and that they had prayed his Majesty's further licence and protection for the exportation of the said wine, &c. And his Majesty thereby permitted the *Drie Vrienden* to proceed from *Portsmouth* to *Holland*. At the time of granting the last mentioned licence, *Van Eyck* had returned to *Holland*. After the granting such last licence, in *December* 1807, the ship sailed from *Portsmouth*, and in her voyage to *Amsterdam* was taken by a *Danish* privateer, and condemned. Upon this evidence, it was objected, that nothing upon these licences rendered legal an insurance upon the property of an alien enemy, who at the time of the ships sailing had ceased to have either domicile or licence to reside here: the licences extending to protect the goods of *British* merchants only. For the Plaintiffs, it was answered, that the second licence did not specify what description of persons should be the owners of property licenced, and that as *Van Eyck* had purchased the goods while he was domiciled in this country under the King's licence, he ought to have a reasonable time allowed him after that 'licence had expired for exporting them. Lord *Ellenborough* C. J. thought, that as the second licence recited the first, it only contemplated an adventure similar to that which was protected by the first, and the first licence would only protect an exportation by *British* merchants, which character *Van Eyck* had ceased to possess at the date of the first licence to trade, his licence to reside in this country having then expired. And his Lordship accordingly directed a nonsuit.

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Shepherd Serjt. in this term moved to set aside the nonsuit and have a new trial, upon two grounds, first,

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that the second licence was penned exactly in the same terms as it would have been if Messrs. *Buuren* and *Kanningeisser* in applying for it had made no reference to the former intended adventure, and it did not imply the restriction, that the wines were to be the property of *British* merchants: secondly, that if it did, *Van Eyck* was at the time of purchasing these goods, for this purpose, a *British* merchant; the extensions of his licence to reside recognized him acting in his business of a merchant, going about to attend the sales at which he purchased this cargo. And if his trading as a *British* merchant had a legal inception, and if, as the second licence to export recites, unforeseen political circumstances prevented him from completing his adventure within the time proposed, yet the protection must extend to the completion of those transactions begun under his licence to reside.

The Court was of opinion that *Van Eyck* was not at all authorized by these licences to export this cargo; and

GIBBS. J. further observed that his name did not appear on either of them; and if ever he possessed the character of a *British* merchant, it ceased upon the expiration of his licence to reside in this country.

Rule refused.

November 10. HOULDITCH and Another v. BIRCH and Another.

A sheriff who carries a prisoner taken in execution to a lock-up-house within his own bailiwick, and keeps him there 14 days before the return of the writ, is not thereby guilty of an escape.

THIS was an action against the sheriff of *Middlesex* for the supposed escape of *George Grant*, who had been taken by the sheriff under a writ of *capias ad satisfaciendum* at the Plaintiffs suit, returnable on the morrow of *All Souls*, indorsed to levy 874*ol.*, besides poundage, &c. Upon the trial of this cause, at the sittings

sittings after *Trinity* term 1812, before *Gibbs J.*, it appeared that *Leach*, an officer of the sheriff, having, under a warrant to him directed, taken *Grant*, permitted him to go to a lock-up-house kept by *Withers*, another officer of the sheriff of *Middlesex*, not named in the warrant. The warrant was carried thither with him, and deposited there. *Grant* continued at this house from the 3rd to the 17th day of *October*, *Leach* usually seeing him in the course of every day. It appeared that it was the ordinary practice for the sheriff, when he took a prisoner in execution, to carry him to a lock-up-house, and keep him there for a convenient time, usually for several days, in order to give opportunity for a compromise, or for raising sums for payment of the debt. The jury found a verdict for the Defendant.

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HOULSTICH
v.
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Shepherd Serjt. in this term, moved to set aside the verdict and have a new trial. He insisted, that the sheriff was bound instantaneously to carry his prisoner to the county goal. The words of the statute 13. *Ed. 1. c. 11.* are express, that the prisoner "shall be sent or delivered unto the nearest gaol of the King in those parts, and shall be received of the sheriff or gaoler, and imprisoned in iron under safe custody;" and the same process is extended by *st. 25 Ed. 3. st. 5. c. 17.* to the action of debt, which was the case here against *Grant*: if this were not so, it would have been unnecessary to make an express legislative enactment, 32 *G. 2. c. 28. s. 1.* that the sheriff "shall not carry any person arrested to any gaol or prison within 24 hours from the time of such arrest, unless such person shall refuse to be carried to some safe or convenient dwelling house," &c. He urged that although the sheriff might change his gaol within his bailiwick, yet he must keep the prisoner in his gaol: and this lock-up-house was the house of another person, not of the sheriff. He referred for
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the doctrine of escape to the cases of *Plat v. Lokke* and *Ayliffe, Plowd.* 35., *Balden v. Temple. Hob.* 202., *Hawkins v. Plomer*, 2 *Bl.* 1048., and *Benton v. Sutton*, 1 *Bos. and Pull.* 24. He admitted that he could not trace the introduction of the practice of carrying prisoners taken in execution to lock-up-houses, nor find any case in which it had been ruled to amount to an escape.

MANSFIELD C. J. I have no idea that this can be an escape. The sheriff has him in as strong close custody as can be. As to the words of the old statute, it is now too late to recur to them, if the universal practice has shewn that the construction now contended for is not the meaning of it. And as I know of no case which says that the keeping him in a strong lock-up-house is an escape, and as the practice is otherwise, I think we ought not so to hold it. If there were particular indulgence or favour shewn to the Defendant, or if the place where he was kept, were dangerous or insecure, there might be some ground to contend for this, but nothing of that sort appears in this case.

HEATH J. It is no escape : according to my recollection, it is warranted by usage.

CHAMBER J. The Plaintiff's counsel is totally mistaken in all he has said about the necessity of a *habeas corpus* to remove from the lock-up-house to the county gaol, because he is in the custody of the same person all the time : and it would be quite ridiculous to have a writ of *habeas corpus* to remove him from the custody of the sheriff, to the custody of the sheriff.

GRIBBS J. I do not say this is like the case of a prisoner on mesne process, whom he may let go upon bail, and whom, if he have at the return of the writ, it is sufficient.

ficient. I believe there are cases where it has been held that if a sheriff goes to the Defendant's house, and keeps him there, it is an escape; but no case shews that this is. Though the practice does not make the law, yet it is very strong argument of it; and considering how many hard actions are daily brought against the sheriff, I cannot doubt that this action would often have been brought long since, if it could have been maintained.

Rule refused.

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BAILEY v. CROFT.

Nov. 10.

THE Plaintiff having been partner in trade with *Bennet*, and having dissolved partnership, upon a statement of accounts between the parties, they agreed on a considerable balance, as due from the Plaintiff to *Bennet*, in part payment of which, the Plaintiff gave *Bennet* his acceptance of a bill for 1349*l.* 16*s.* *Bennet* had indorsed this bill and delivered it to the Defendant, who advanced to him thereon 500*l.*, and it was agreed between them that 300*l.* more should be raised on the bill for the use of the Defendant, to whom *Bennet* was indebted in a greater amount than the whole contents of the bill. The Plaintiff and *Bennet* afterwards discovering that the real balance of accounts between them had not been correctly ascertained, were desirous to refer the accounts to arbitration, and in order to remove the obstacle which would arise from the bill which had been already given, and had been put into circulation, they agreed that that bill should be given up, and that a bill of the like date, and with the like securities, for such other sum of money as the arbitrators should award to

In order to facilitate the making of an agreement, for which there was sufficient consideration, between the Plaintiff and a third person, the Defendant, who received no benefit to himself by the agreement, became party thereto: Held, that as the agreement was such as the Plaintiff would not have made, unless the Defendant had acceded, there was a sufficient consideration for the Defendant's promise.

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be the balance due, should be accepted by the Plaintiff, and delivered to *Bennet*; and upon their application to the Defendant to accede to this agreement, he agreed to deliver up the bill of 1349*l.* 16*s.* 1*d.*, and to accept a like bill for the amount to be awarded; whereupon the Plaintiff and *Bennet* submitted their accounts to arbitration. The arbitrators awarded that the former supposed balance, secured by the Plaintiff to *Bennet*, was too much by 318*l.* 1*s.* The bill not being given up to the Plaintiff, he declared upon this transaction, and stated, that in consideration of the mutual agreement, and in consideration that the Plaintiff had undertaken to accept a bill for the sum to be awarded in exchange for the first bill, *Bennet* and the Defendant undertook to give up the first bill; and averred a request and refusal by the Defendant. Upon the trial of this cause before *Mansfield* C. J., at the sittings at *Guildhall* after *Trinity* term 1812, a verdict was found for the Plaintiff.

Shepherd Serjt. now moved to set aside the verdict and enter a nonsuit, upon the ground, which he had also urged at the trial, that there was no consideration moving from the Plaintiff for the promise of the Defendant.

MANSFIELD C. J. The Plaintiff agrees to give a new bill, which will impose a liability on him, and that is a consideration beneficial to the Defendant.

HEATH and **CHAMBRE** Js. concurred in refusing the application.

GIBBS J. Suppose the agreement had stood merely between the Plaintiff and *Bennet*! no doubt there would have been sufficient consideration as between them. The Defendant is included in the treaty, because he is the holder of the bill: he is taken in on *Bennet*'s account, and in consideration of what the Plaintiff agrees to do
beneficial

beneficial to *Bennet*, the Defendant, on *Bennet's* account, agrees to do this. The Plaintiff certainly would never have entered into this agreement to refer and give a new bill for the balance found, unless the Defendant had come into the measure, and agreed to give up this bill: the Plaintiff would never have left this bill outstanding in the hands of the Defendant, exposing himself to have the amount of both bills recovered against him. In giving the second bill, the Plaintiff gives that which is beneficial to *Bennet*; and the giving up the former bill is part of the equivalent paid for the doing that which is beneficial to *Bennet*: it appears to me, therefore, that there is a sufficient consideration for the promise.

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v.
CROFT.

Rule refused.

MUCKLOW v. ST. GEORGE.

Nov. 11.

THE Defendant, in 1802, gave a promissory note for the amount of a debt due to the Plaintiff; and afterwards went to *Ireland*, where he took the benefit of an insolvent act. Since that time the Plaintiff's servant had asked the Defendant for the debt, whereupon he inquired how much was the amount, and being told between 60*l.* and 70*l.*, he answered, that he was not able at that time to discharge it, but that his friends were about to do something for him, and he would pay the debt by instalments. At the trial of an action upon the note, the Plaintiff relied upon this as evidence to establish a new promise to pay, and was nonsuited.

A promise made after taking benefit of an insolvent act, to pay an old debt by instalments, without specifying the amount, or time of payment, will not raise a new *assumpsit* to pay the debt.

Vaughan Serjt. now moved to set aside the nonsuit and have a new trial. He contended that this was as good evidence of a subsequent promise to pay, as had sufficed

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fulfilled in the case of *Bryan v. Horsfeman*, 4 *East*, 599. This amounted to a promise to pay the debt by reasonable instalments within a reasonable time.

The Court expressed their dissent from this proposition, and observed that this case was not like the cases under the statute of limitations; this evidence might suffice under that statute: and *Mansfield C. J.* said that the cases upon the statute of limitations had indeed gone to an enormous length: there never was such another case as that which had been cited.

Rule refused.

Nov. 11.

STURGESS v. FARRINGTON.

In covenant for rent, the Defendant pleaded that he was under-tenant of parcel of certain premises, for the whole of which the Plaintiff, his lessor, had covenanted to pay rent to the landlord paramount, and shewed that he, the Defendant, paid to the landlord paramount, under threat of distress, more rent than he owed to the Plaintiff; the

Plaintiff traversed that any rent was due from himself to the landlord paramount. Held that this replication was not supported, by proving that the Plaintiff had assigned his term in the residue of the premises to *K.*, who assigned them to the Defendant, who covenanted to pay in discharge of the Plaintiff the whole rent reserved to the landlord paramount.

THE Plaintiff declared in covenant for rent, upon an indenture of lease made by himself to the Defendant, of certain premises, at 60*l. per ann.* The Defendant pleaded that the Plaintiff held the premises, together with other hereditaments, under an indenture of lease, dated the 7th of February 1807, whereby *Roberts* and *Valentine* demised the whole to the Plaintiff, at 100*l.* rent, and he set out a covenant by the Plaintiff to pay the rent to his lessors, and shewed that the Plaintiff afterwards, by the indenture declared on, demised parcel of the demised premises to himself, the Defendant; and that *Roberts* and *Valentine* assigned to *Powell* the reversion in the freehold expectant on the term demised to the Plaintiff; that before the rent claimed became due, two years'

rent at 100*l. per ann.* became due from the Plaintiff to *Powell*, who required from the Defendant payment thereof, under a threat of a distress, to avoid which, the Defendant paid to *Powell* that money. The Plaintiff, by his replication, took issue upon this plea, and traversed that the 100*l. per ann.* was due from himself, the Plaintiff, to *Powell*. Upon the trial of the cause before *Mansfield C. J.*, the Plaintiff, to support this issue, proved that he had assigned to *Kingbury* his unexpired term in the residue of the premises, not included in the demise to the Defendant, under a covenant on the part of *Kingsbury*, that he would pay the whole 100*l. per ann.* rent reserved to *Roberts* and *Valentine* : and he proved that *Kingbury* had assigned that interest to the Defendant himself, who was bound by a similar covenant to discharge the 100*l. rent*; wherefore, as the Plaintiff contended, that rent was no longer payable from himself to *Powell*. *Mansfield C. J.*, however, nonsuited the Plaintiff, with liberty to move to set aside the nonsuit, and to enter a verdict for the Plaintiff for 15*l.* upon any of the issues, if the Court should be of opinion that the replication was proved.

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Best Serjt. accordingly now moved, contending that the 100*l. rent* had not accrued due from the Plaintiff to *Powell*; but the Court were unanimous that, inasmuch as the title was specially stated by the plea, if the Defendant had meant to insist that the Defendant, as the assignee of *Kingbury*, was, as between the Plaintiff and the Defendant, precluded by his covenant from asserting the Plaintiff's liability to pay the 100*l. rent*, he ought to have specially replied the facts upon which that question might arise, by way of confession and avoidance; but here he had contented himself with denying that the rent was due from himself; whereas it was most cor-
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rectly stated to be due from the Plaintiff to *Powell*, who might have distrained upon the premises, and avowed upon the Plaintiff; and they

Refused the rule.

Nov. 11.

REED v. TAYLOR.

If a Plaintiff declares that the Defendant maliciously and without probable cause preferred an indictment, setting it forth, the averment is proved if some charges in the indictment were maliciously and without probable cause preferred, although there was good ground for others of the charges preferred.

THIS was an action for a malicious prosecution. In the first count, the Plaintiff declared that he was a good subject, had never been guilty of perjury, &c., and that the Defendant, maliciously intending to injure him, &c., at the general session of oyer and terminer, holden in and for the county of *Middlesex*, falsely, maliciously, and without any reasonable or probable cause whatsoever, indicted the Plaintiff "for that theretofore, &c.," setting out *verbatim* the whole indictment, which contained twelve assignments of perjury, stated to be committed by the Plaintiff in an affidavit by him made in a cause pending in Chancery, before a master of that court, touching eight several payments and transactions therein sworn to: the Plaintiff then proceeded to shew that the indictment was removed into the Court of King's Bench, where he was tried and acquitted. In the second count, the Plaintiff stated that the Defendant, at the said general session of oyer and terminer, falsely and maliciously, and without any reasonable or probable cause, indicted the Plaintiff for wilful and corrupt perjury, in a certain affidavit before then sworn by the Plaintiff before the master in Chancery. This cause was tried at the sittings at *Westminster*, after *Trinity* term 1812, before *Mansfield C. J.*, when the Defendant produced evidence as to three of the transactions upon which the perjury had been assigned, shewing that the

parts of the affidavit relating thereto, were untruly sworn, and that, in matters which must have lain within the Plaintiff's own knowledge. As to others of the transactions, it appeared that the Plaintiff had truly sworn in the affidavit, and that there was no probable cause for the assignments of perjury on those transactions. The jury found a verdict for the Plaintiff with 100*l.* damages, which the Plaintiff entered on the first count only.

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 v.
 TAYLOR.

Shepherd Serjt. now moved for a rule *nisi* to set aside the verdict and have a new trial. He contended that the verdict could not be supported upon this declaration; the charge was, not that the Defendant had inserted some groundless assignments in his indictment, but that he had preferred the whole indictment set forth, without reasonable or probable cause: if there were reasonable or probable cause for any one assignment, that issue could not be with the Plaintiff: but there was abundant cause, both reasonable and probable, for several of these assignments. It would be of very ill consequence to public justice, to hold, that if there were in an indictment for perjury any one count or assignment that was not proved at the trial, the prosecutor would lie open to an action for a malicious prosecution. In none of the decided cases had it been held, that a probable cause being found for some of the charges, damages given for preferring the others could be supported. These charges, too, all arise out of one affidavit and one oath.

MANSFIELD C. J. The question is, whether, if a man prefers an indictment containing several charges, whereof for some there is, and for others there is not probable cause, this does not support a count for preferring that indictment without probable cause, I am of opinion that it does. You mention no precedent for

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this ground of your motion, and therefore I do not know how we can grant it.

GIBBS J. To support this action there must be a want of probable cause and malice. The charge here is not that the Defendant imputed perjury without probable cause, but that he preferred that indictment without probable cause. There is no probable cause for some of the charges in the indictment, therefore this indictment is preferred without probable cause.

Rule refused.

Nov. 11. ———, Demandant; ———, Tenant; ———,
ROBINSON and Others, Vouchees.

Where a recovery had failed to be completed in the term in which it was intended, through the refusal of one of the vouchees to accede to it, the Court, in a subsequent term, for the benefit of the other parties, permitted it to be completed.

SHEPHERD Serjt. moved that a recovery might pass under the following circumstances. The writ of summons was returnable in the last *Hilary* term, the acknowledgment of *Robinson* and his wife, two of the vouchees, had been taken in *December* last, but the other vouchee, who had an undivided interest in the property, the sale of which was to be effectuated by this recovery, on being applied to to execute her acknowledgment, refused to do it, complaining that her companion, whom she had authorized to negotiate a sale of the estate, which was of considerable value, had sold it for 50*l.* too little, and it was not till the end of *Trinity* term that she had been persuaded to concur in executing the conveyance.

The Court said, that seeing this was not the negligence of the attorney, the ordinary cause why recoveries are delayed, the application might be granted.

1812.

HILL v. WILKINSON and Wife.

Nov. 11.

SHEPHERD Serjt. moved for a *disfringas* to compel an appearance, upon an affidavit "that the Defendant had been served with a summons, pursuant to the late act of parliament, 51 G. 3. c. 124. s. 2., by delivery thereof to a servant of the Defendant, at his dwelling house, and that his wife had since acknowledged that her husband had received the summons, and had promised payment of the debt." The Court were of opinion that this service was sufficient; but refused, as they had before repeatedly done in like cases, to grant a *disfringas* upon such an affidavit, whereby the bailiff took on himself to adjudge that the form of the summons which he served, sufficiently complied with the directions of the act, a matter of which the Court alone were to be the judges, when the summons should be set before them *in hac verba*. *Shepherd* then procured another affidavit setting forth the tenor of the summons, whereupon the Court granted the *disfringas*.

The affidavit of service of a summons, made in order to move for a *disfringas*, must set forth the tenor of the summons served.

 JOHN HUTCHISON v. BIRCH and Another,
 Sheriffs of LONDON.

Nov. 12.

TRESPASS. The Plaintiff declared that the Defendants, with force and arms, broke and entered the Plaintiff's dwelling house, and forced and broke

A sheriff having entered at the open doors of an house, need not demand to have

the inner doors opened to him before he breaks them in order to take, under a writ of *feri facias*, goods which are within them.

A sheriff may enter a house to search for the body of a debtor, under a writ of *capias ad satisfaciendum*.

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open, broke to pieces and damaged divers doors of the Plaintiff, of and belonging to his dwelling house, and divers locks, staples, and hinges thereto belonging, and wherewith the same doors were there locked and fastened, and also seized and took, and converted to their own use, divers goods of the Plaintiff there found, The Defendants pleaded, first, the general issue, and secondly, as to the trespasses above enumerated, they pleaded that a writ called a *testatum fieri facias* had issued at the suit of *Arnaud Lewis*, directed to the Defendants as sheriffs of *London*, commanding them to levy 218*l.* 5*s.*, and 28*d.* costs, upon the goods of *William Hutchison*, which writ, indorsed to levy 250*l.*, was delivered to the Defendants; and that the chattels in the declaration mentioned, before and at the said times when, &c., were in the dwelling house in which, &c., within their bailiwick, and were the joint property of *William Hutchison* and the Plaintiff; wherefore the Defendants being such sheriffs, afterwards, and before the return of the writ, to wit, at the first of the said times when, &c., entered into the dwelling house, the outer door thereof being then open to seize, take, and carry away the said goods, for the purpose of making the monies by the writ directed to be levied upon the said *William Hutchison*'s undivided moiety of such goods, and because the Plaintiff then and there, before the Defendants could take and carry away the goods, with force and arms expelled the Defendants from the said dwelling house, they, being such sheriffs, did then and there, before the return of the said writ, re-enter into the said dwelling house, in order to seize, &c., and did seize, take, and carry away the said goods, for the purpose of making the said monies to be levied upon *W. Hutchison*'s moiety thereof, as it was lawful for them to do; and because certain inner doors of and belonging to the said dwelling house, at the said times when, &c., were shut, locked, and fastened, with
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the said locks, staples, and hinges, so that the Defendants could not seize, take, and carry away the goods aforesaid, to make the monies aforesaid, upon *W. Hutchinson's* moiety thereof, or execute the said writ, without forcing and breaking open the said inner doors, the Defendants, while they so continued in the said house, did force and break open the said inner doors, and in so doing did necessarily a little break and damage the same, and a little break to pieces, damage, and spoil the said locks, &c. To this plea the Plaintiff demurred, and assigned for cause, that although it was therein alleged that the Defendants did force and break open the inner doors of the dwelling house in which, yet it was not therein stated or alleged that the Defendants, before they forced and broke open the said inner doors, made any demand or request of admittance, or leave to enter the said inner doors, or any demand or request of the keys thereof; or that no person was present or ready to give admittance through the said doors to the Defendants, nor was any cause or reason assigned why the Defendants did not demand admittance or leave to enter the same. The Defendants joined in demurrer.

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Vaughan Serjt., in support of the demurrer, said, there were two questions in this case: first, whether the sheriff can break any inner door of a house without previously stating his purpose, and demanding the keys; and, secondly, supposing that such demand is necessary, whether he can avail himself of his authority without shewing in pleading that such demand has been previously made. The same principle which requires a sheriff to ask admittance and shew his authority at the outer door, before he can presume to break it, also requires that he should make a request for the inner doors to be opened to him: that principle is, that the process of the law shall be executed as tenderly as possible, and that although the

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law will justify the using so much force as is necessary for the completion of his purpose, it will justify no greater degree of force than that necessity demands. It is to be presumed that the process of the law will be respected and obeyed, as soon as the sheriff's intention is communicated, and that no resistance will be opposed to it: but, until notice or demand, the officer of the law cannot be known. And even if a violent re-entry could have been justified at the moment of the expulsion of the sheriff, yet it is to be inferred from the language of this plea, that a considerable time intervened between the expulsion and the re-entry; for the plea only states that the Defendants, before the return of the writ, re-entered. And after such an interval as may be presumed to have taken place, the second entry of the sheriff ought to have been attended with the same formalities as the first. Secondly, if a request was necessary, it ought to be expressly averred in pleading that it was made, or at least it should appear upon the plea that the breaking of the doors was necessary, which the Defendant has here omitted to shew. In support of these propositions he referred to *Ratcliffe v. Barton*, 3 Bos. & Pull. 223., which he said was precisely this case. There Lord Alvanley C. J. said, that it would be carrying the law upon this subject to an alarming extent, if the Court should hold that because a man might happen to owe money in any part of *England*, the sheriff of the county in which his house was situated, might break open every door and every trunk in which a man might be concealed; and that, as often as he thought proper, so as it were before the return of the writ. It appeared to him that the law had gone quite far enough on that subject. It had been said that the outer door of the house is the man's castle, but that the inner doors may be broken open for the purposes of civil process. It had never been said, however, that the officer

officer might justify breaking inner doors without averring a previous demand of peaceable admittance, or shewing why such violence was necessary." And *Heath J.* in his judgment in that case, says, "The plea appears to me to be bad, because it states no demand of admittance, and I shall give my opinion upon that point alone. The law of *England*, which is founded on reason, never authorises such outrageous acts as the breaking open every door and lock in a man's house without any declaration of the authority under which it is done." *White v. Whitshire, Cro. Jac.* 555., most fully reported in 2 *Ro. Rep.* 137., but the best report of the case is in *Palm.* 52. Trespas for breaking the inner door of the house: the Defendant pleaded that he entered to make execution upon the goods of the Plaintiff under a writ of *feri facias*, and he doth not aver that the goods were in the house, and *Nicholas Hyde* there urged that it was not lawful for the sheriff, upon an execution at the suit of a common person, to break the door of the house, and cited *Seymayne's case*, 5 *Co. Rep.* 92. 3rd ref. In cases where the King is party, before the sheriff breaks the door, he ought to signify the cause of his coming, and to make request to open the doors, and cites 18 *Edw. 2. Execut.* 252.

Pell Scrjt. contrd. Both the cases of *Radcliffe v. Burton*, and *White v. Whitshire*, are directly in support of this plea. In the former, which was quite dissimilar to this case, the sheriff entered in search of the person of a Defendant, whom he did not know, nor aver, to be in the house: here the sheriff enters to take goods, which he does know and avers to be in the house. And all the Judges there proceed on the manifest distinction between an entering to make search, and an entering to take a person who was in the house, 3 *Bos. & Pull.* 229, As to the latter

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case, although the report in *Rolle* is more at length, it does not state this point so distinctly, but in the report in *Palmer* the point appears, and the Plaintiff had judgment thereon: and in *Palmer*, although *Doddridge* and *Haughton* said something on the third point, about refusing admittance, which is not noticed by either of the other cotemporary reporters, yet on the second point, they decided against the Plaintiff. *Pasch. 4 Edw. 4. pl. 19. Catesby* shewed that a writ of *feri facias* was directed to the sheriff of *Middlesex* to levy execution for one *J.*, upon a recovery had by the said *J.* against one *B.*, whereupon *B.* put all his goods into a chest, locked and shut up; and then the sheriff broke the door of the house, and entered into the house, and took away the goods with him. And the question was, whether the sheriff did any wrong or not. *Littleton*, and all his companions, held that the party might have a writ of trespass against the sheriff for the breaking of his door, notwithstanding the *feri facias*: for the *feri facias* shall not excuse him for the breaking of the house, but for the taking of the goods only, *quod nota, &c. 13 Edw. 4. 9. acc.*, so that, as Lord *Mansfield* C. J. remarks in *Lee v. Gansel, 1 Cowp. 1.*, they held that the breaking of the trunk was not actionable.

Vaughan in reply. The case from the year-books is very distinguishable; it is not contended that the sheriff might not break a trunk in the house, when he had entered without force. It does not appear by the case of *Ratcliffe v. Burton*, that the person was not in the house at the time of the sheriff's entry: it must be taken that he was there. In the case of *Burdett v. Abbot, 14 East, 1.*, it was admitted that it was necessary for the sheriff to demand admittance before breaking the outer door: it is equally necessary to demand admittance before breaking an inner door, and no necessity for breaking it is averred.

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MANSFIELD C. J. In this case an action of trespass is brought for breaking an inner door of a house. The ground of the plea is, that a debtor, against whom an execution had issued, had an undivided moiety of certain goods, which were in this house, in a room which was locked up, so that the sheriffs could not get at the goods, and that in order to get at them they broke the door of the room, and took the goods; and it is objected to this plea, that it is not shewn that there was any previous demand made of the Plaintiff to open the door: the question therefore is, whether any such privilege belongs to the inner door of an house, that admittance is to be asked before the officer can break in. All the cases agree that such a privilege attaches to the outer door of a dwelling, because, according to the language of the books, it is the owner's castle: but no case is cited in which it has been held that the same privilege belongs to the inner door of a house; and until I saw this demurrer, and heard some of the *dicta* that have been cited, I did not apprehend that it had ever been attempted to distinguish between the inner doors of rooms and other inner doors, as those of closets, cupboards, trunks, and the like. Suppose there are ten rooms in a house, and goods in each, is it necessary to make a demand for opening each door? As to the case of *Ratcliffe v. Burton*, there is a very solid distinction between that and the present case. There was no averment at all that the debtor was in the house, and it must be taken that he was not there: and Lord *Alvanley* doubted whether, notwithstanding that fact, the sheriff might not justify going in, if the outer door were open, to search for him: but it is not necessary for us to decide that point; it is enough justification for this case, that the goods were in the room, and that the sheriff could not get at them without breaking the door. It is urged that Lord *Alvanley* thought the plea must contain

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contain an averment "shewing why such violence was necessary;" but this plea does shew it; "because the sheriff could not otherwise get at the goods."

HEATH J. I am of the same opinion. If in *Radcliffe v. Burton* I said that a demand was necessary before breaking an inner door, I do not recollect it: but as I have no reason to doubt the accuracy of the reporter, I shall presume that his account is right: but if so, the opinion certainly was extrajudicial; for it was unnecessary to decide in that case whether a previous demand were requisite or not, in order to take goods or the person found in the house: the point there was, whether the sheriff could break the inner doors to search for a person not in the house.

CHAMBRE J. I can entertain no doubt upon this question. The case of *Ratcliffe v. Burton* is, in the main, right, though some of the points asserted in that case may not be tenable. But that case has not the least resemblance to this. There the plea claimed a right to break inner doors in order to search for and arrest. As to a demand being in every case necessary, I do not see how any execution could proceed, if the officer were to stop between the opening of every drawer and box, to make a fresh demand for the next to be unlocked. The argument that has been raised for the Plaintiff upon the averment that the Defendants re-entered before the return of the writ, is not well-founded: there is nothing in this plea to shew that the whole was not one continued transaction. If there had been any extraordinary violence or unnecessary mischief committed by the sheriffs in executing their authority, that ought to have been shewn by way of replication and new assignment. I very much think that the sheriff may in every case break an inner door; but it is not necessary

necessary to decide that point, because, upon the form of the plea, I think that the plea is sufficient.

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GIBBS J. I am of the same opinion with my Brothers. The argument is, that because a demand and refusal are necessary to justify the breaking of an outer door, therefore the like demand and refusal are necessary before breaking open an inner door: but no authority is cited in support of that proposition. The case of *Ratcliffe v. Burton* rather makes against it. Let us see then what the law is. The sheriff cannot break the outer door without a demand; but after the sheriff has entered the house in which the person or the goods of the Defendant are contained, (omitting the question of breaking doors for the purpose of search,) I take it to be clear, that he may break open any door within the house without any further demand. If the Defendant stands with the key, and offers to open the door, and the sheriff unnecessarily breaks it, or uses any other unnecessary violence, that should be made to appear by way of new assignment; it must certainly be taken as a fact upon the pleadings in *Ratcliffe v. Burton*, that the debtor was not in the house. But this plea sufficiently shews that the Defendants were authorized to take the goods, that the goods were in the house, and that the Defendants broke the doors in order to take them. It is to be gathered from this plea that the expulsion and re-entry form one transaction: for the plea says, that before the return of the writ, to wit, at the first time mentioned in the declaration, the Defendants entered, and the Plaintiff expelled them, and that the Defendants, then and there, which must be taken to refer to the said first time, re-entered into the house to take the goods, and while they continued in the house, and before the return of the writ, they broke the doors. A pleader always takes care, when he is defending under the authority of a writ,

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writ, that every material allegation shall have that guard about it, of an averment that the act was done before the return of the writ; and as to the objection that the Defendants do not aver any necessity for breaking the doors, they aver that which is equivalent, for they state, that the doors were locked, so that the Defendants could not take the goods without forcing the doors; which is as good an averment of the necessity of so doing, as if they had employed the word necessarily. I therefore think, that the judgment must be for the Defendants. I say nothing on the case, where the sheriff, finding the door open, enters to search for the person of a Defendant, but I should think that he would in that case be justified, if he had a reasonable ground to believe that the person was in the house; because, if he had information that the person was in the house, and should return *non est inventus*, without going to take him, and it should be proved that the person really was there, I think the sheriff would be liable to an action for a false return.

Judgment for the Defendants.

Nov. 12.

LANGHORN v. HARDY.

A policy at and from G. on goods, beginning the adventure from the loading on board the ship, will not protect goods laden on board before the ship's arrival at G.

THIS was an action upon a policy of insurance, "at and from *Gottenburgh* to any port or place of discharge in the *Baltic*, upon any kinds of goods and merchandizes, and also upon the body, tackle, &c. of and in the good ship the *Elizabeth*; beginning the adventure upon the said goods and merchandizes from the loading thereof aboard the said ship." And the insurance was clared to be "on coffee and sugar." Upon the trial of this cause at *Guildhall*, at the sittings after *Michaelmas* term

term 1811, before *Mansfield C. J.*, it appeared that the vessel, after sailing from *Gottenburgh* with her cargo, was captured in a manner which made the loss to come clearly within the terms of the policy, if the risk ever attached; but it was proved, that the cargo, like all other colonial produce destined for the *Baltic* at the present period, had been put on board the ship *Elizabeth* in *London*, and had not been unloaded and re-shipped on her arrival at *Gottenburgh*, but continued on board without being shifted, until, and at the time of her capture. Conflicting evidence was given by the contending parties, upon the point, whether the Defendant, at the time of signing the policy, knew that the cargo was put on board in *London*, and was intended to continue on board during the voyage insured: and the jury, at the time of giving their verdict for the Plaintiff for a total loss, expressly found, in answer to a question put to them by the Chief Justice, that the Defendant, at the time of his executing the policy, knew this fact.

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Lens Serjt. in *Hilary* term 1812, obtained a rule nisi to reduce the verdict to 31*l.* 10*s.*, the amount of the premium, which he admitted that the Plaintiff was entitled, under the circumstances, to recover, contending that the adventure insured by this policy never had any commencement; for the commencement was to be a loading of goods at *Gottenburgh*; and that inasmuch as the goods never were loaded at *Gottenburgh*, consequently the risk never attached: to hold otherwise would involve the absurdity of the risk beginning long before the voyage insured had its inception.

Shepherd and *Best Serjts.* now shewed cause. They endeavoured to distinguish this case from the only four cases which they said were at all similar. *Hodgson v. Richardson*, 1 *Bl. Rep.* 463., the first of them, was a case of fraudulent concealment. There perishable goods were

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were greatly damaged by having lain on board a long time before the commencement of the insurance. The second case, *Robertson v. French*, 4 East, 130., and the third case, that of *Spitta v. Woodman*, ante 2. 416., were also materially distinguishable: for in each of them, although the circumstance of the Defendant's having subscribed a policy on the outward voyages to *Brazil* and *Gottenburgh* respectively upon the indetical subject matter of the insurances afterwards disputed, afforded a ground of presumption that the underwriters knew they were insuring cargoes laden before the inception of the voyage expressed in the policy, yet the jury did not expressly find that the Defendants were conscious of that fact; and it therefore must be taken that they were not. The fourth case, of *Horneyer v. Lufbington*, 15 East, 46., must be considered as having proceeded on the authority of the preceding cases, and as differing, like them, from the present case, in this peculiar circumstance. It has never yet, therefore, been decided, that where it was communicated to the underwriter that the goods were to be on board before the inception of the voyage insured, the Plaintiff might not recover on that policy. The instrument must be construed, if possible, *ut res magis valeat quam pereat*: and the two apparently inconsistent descriptions of the risk, when taken together, amount to this, "beginning the adventure upon the goods, so soon as they shall be found on board at *Gottenburgh*."

Lens and *Vaughan* Serjts., *contra*, were stopped by the Court.

MANSFIELD C. J. If there had been neither such an express finding, nor such evidence in the cause, we could not have given the policy the construction contended for: we cannot make the construction of a written instrument

strument to depend upon the knowledge which the Defendant may happen to possess of facts. This is precisely the case of *Spitta v. Woodman*, and both Courts have now determined the point. How can we get over these authorities? If parties will be so careless of suiting the language of their instruments to their transactions, they have no one to blame for their losses but themselves.

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Rule absolute.

SHERWOOD, Gent. one, &c. v. BENSON.

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WILKINSON, who had been a bankrupt, being taken by the Defendant, the Sheriff of *Surry*, in execution under a writ of *capias ad satisfaciendum* issued at the suit of the Plaintiff, in an action, the cause of which accrued before his bankruptcy, produced to the officer his certificate of conformity, and demanded his release, with which the officer immediately complied. The Plaintiff thereupon commenced the present action against the sheriff for an escape.

The Court will not stay proceedings in an action for the escape of a certificated bankrupt taken in execution, released by the sheriff upon production of his certificate.

Best Serjt. on this day moved for a rule nisi, that upon payment of the costs of this action, and of the present application, proceedings in the cause might be found: he argued, that if *Wilkinson* had taken out a summons in order to his being carried before a Judge, he must, under the stat. 5 G. 2. c. 30., necessarily have been discharged. It was impossible the Plaintiff could recover more than nominal damages in this action; and the payment of costs would put him in as good a situation as he would be in, either in the case of his recovery in this action, or in case of *Wilkinson's* having been discharged.

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charged by a Judge's order; it was therefore reasonable that this rule should be granted.

The Court said, in case of a summons and appearance before a Judge, the matter would have come directly under the cognizance of the Judge to try whether the debtor were entitled to his discharge or not. Here it was attempted to be brought before the Court collaterally: the Court would not try this cause upon an affidavit, nor could they speculate upon what the amount of damages would be. And the application must therefore be

Refused.

Nov. 17.

FIGES v. ADAMS.

If, upon the reference of an action in this court, the arbitrator award the costs of a nonsuit to be paid by the one party, and a larger sum to be paid as a debt by the other party, the party awarded to pay the smaller sum is entitled to a set-off, without motion.

And if payment of the smaller sum is enforced by attachment, the Court will set the attachment aside.

The like set-off in case of cross-judgments for debt or damages and costs.

THE Plaintiff, who was an attorney, brought an action to recover his demand for business done, and also for commission due upon negotiating certain bills of exchange for the Defendant. Upon the trial, the Plaintiff failed to recover for business done, not having, in the delivery of his bill, complied with some of the regulations of the statute; but the whole matter was referred to an arbitrator, who awarded that the Plaintiff was indebted to the Defendant in 75*l.*, for the costs of the action, in which he ought to have been nonsuited; that the Defendant was not indebted to the Plaintiff in any thing for the commission; but that the Defendant should pay so much of the bill for business done by the Plaintiff as an attorney, as the Master of the King's Bench, upon taxation, should allow; and that the costs of the award should be borne equally between the parties. The Master allowed 17*l.* The Defendant's attorney took up the award, and paid the whole fee, 28*l.* 7*s.* and

and had obtained an attachment against the Plaintiff, under which he had received 89*l.* 3*s.* 6*d.*, consisting of the amount of the costs of the action, and the moiety of the costs of the award. The Defendants had become bankrupts, and the Plaintiff had proved under their commission, the balance which remained due out of his debt of 171*l.* after deducting the above mentioned sum of 89*l.* 3*s.* 6*s.*, which he proposed to set off against that debt; and before the attachment he had offered to pay the balance.

Pell Serjt. had in this term obtained a rule *nisi* to set aside this attachment and to restore the money which had been levied, upon the ground that the Plaintiff was entitled to this set-off.

Shepherd Serjt. for the Defendant, and *Boss* Serjt. for his attorney, now shewed cause: the Plaintiff could not avail himself of his cross-demand by way of set-off without a previous special application to the Court, which he had not thought proper to make; and therefore the Defendant's attorney, who had expended 14*l.* 3*s.* 6*d.*, one moiety of the costs of the award, more than he needed to have done, in order to preserve his lien, and obtain his regular attachment, ought not now to be deprived of the fruit of it. In all other courts the lien of the attorney was paramount to the equitable claims of the parties against each other, and in the case of *Hall v. Ody*, 2*Bos. & Pull.* 28. Lord *Eldon* C. J. strongly reprobated the injustice of the contrary practice, which had obtained here, of setting off the costs upon motion: and the Court then agreed it was fit that the practice should be reconsidered: they therefore will not extend the practice; and no case has gone so far as to deprive either party of his attachment, when the other has not thought fit to apply for the benefit of his set-off. At least the rule ought not

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to extend to refunding that moiety of the costs of the award, which the Defendant's attorney spontaneously advanced for the Plaintiff, because the latter had not taken up the award.

Pell supported his rule.

MANSFIELD C. J. Whether the rule established in this court be a right one, is a matter of future consideration, but while the rule stands, we ought not to take away the right of the party. The rule of reference renders the whole of these cross-demands, as it were, one transaction; and, certainly, if the matter had been mentioned at the time of making that rule, the Court would have directed the set-off to stand as part of the terms of the reference. The Defendant's attorney might have rested assured that the Plaintiff would have taken up his award for the sake of obtaining payment of the 17*l.*; therefore he need not have expended the 14*l.* 3*s.* 6*d.*; and if he knew the practice of this Court, surely he sued out the attachment without any reason.

GIBBS J. The Plaintiff certainly would, upon application to this Court, have been permitted to avail himself of this set-off. The only objection made to his now having it, is, that he has lost it by not having so applied to the Court; but I conceive that not to be the case. For if *A.* had recovered a judgment with costs against *B.*, and *B.* had recovered a judgment with costs against *A.*, and the party who recovered the larger sum were to attempt to enforce his judgment against the other for more than the balance, it is clear that this Court would on motion stay the proceedings. I do not see how the Defendant is here in a different situation.

**Rule absolute for re-payment
of the whole sum.**

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MAYOR v. KNOWLER.

November 18:

THIS was an action of trespass for entering the Plaintiffs dwelling house, and for seizing, taking, and carrying away his goods. The Defendant pleaded the general issue. Upon the trial of this cause before *Mansfield C. J.* at the sittings at *Westminster* after *Trinity* term 1812, a verdict was given for the Plaintiff, subject to the opinion of the Court on the following case. The commissioners under an act of parliament 34 G. 3. c. 96., (local) intituled “An act for paving, cleansing, lighting, watching, watering, and otherwise improving and keeping in repair the streets, squares, and other public passages and places which are and shall be made upon certain pieces of ground in the parishes of *St. Pancras*, *St. George the Martyr*, and *St. George Bloomsbury*, or some or one of them, in the county of *Middlesex*, belonging to the hospital for the maintenance and education of exposed and deserted young children, commonly called the *Foundling Hospital*,” made a rate in the form prescribed in the act upon a new-built house, No. 4. in *Hunter Street North*, within the limits of the act and the local jurisdiction of the commissioners, of which house the Plaintiff was the owner and proprietor, but which had never been inhabited or occupied: the Defendant was the collector, and levied the rate under a regular warrant of distress. The rate was made to the same amount as if the house had been inhabited at the time of making thereof. The question for the opinion of the Court, was, whether the commissioners were authorized by the provisions of the act of parliament, to make a rate upon a house that had never been let or occupied. By s. 38. of the act, the commissioners were empowered to make rates “upon all and every person and persons who should

Under the Foundling Hospital paving act, 34 G. 3. c. 96. the land-; lord of a new-built house is not liable to be rated for it before it is inhabited.

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inhabit, hold, use, occupy, possess, or enjoy, any land, ground, house, shop, warehouse, coach-house, stable, cellar, vault, building or tenement, in any of the said streets, squares, &c., in such sums as therein are mentioned." By *§. 53.*, "the first year for which such rates or assessments should be made, should commence for or in respect of all such houses or buildings as at the date of the act were, or should be *then* erected or built and tiled in, from the 24th of *June* 1794; and for and in respect of all such houses and buildings thereafter to be erected within the limits of the act, such first year should commence from the next quarter-day after the pavements should have been made in the front as far as the middle of the street, square, or place on which they should respectively abut; provided, that when any of the houses or other buildings, after the same should have been once inhabited or occupied, should at the time of making any of the rates or assessments be empty, or unoccupied, it should be lawful for the commissioners to rate and assess such premises respectively at one-half of such rates or assessments, and no more, during the time only such premises should be empty or unoccupied; and also in case any such premises after the making of any such rate or assessment should become empty or unoccupied, one-half only of such rates or assessments should be charged on such premises respectively, for and during so long time as the same should continue empty or unoccupied; and in every such case, the said rates or assessments, and all arrears should be paid by the person or persons for the time being entitled to such premises, or by the first or any other tenant or occupier thereof; and every such tenant or occupier thereof should and was thereby authorized to deduct and retain the same out of his or her rent; and the person or persons for the time being entitled to such premises, was and were thereby required to allow such deduction; and

where any house, building, or tenement, in respect whereof any rate or assessment should be made or assessed, should be let to more than one tenant, any one or more of such tenants should be deemed the occupier or occupiers thereof for the purpose of that act ;” and it was by a subsequent clause further enacted, “ that every rate or assessment which should be laid by virtue of that act, for or in respect of any house, building, coach-house, stable, or tenement, which any ambassador, resident agent, or other public minister of any foreign prince, or state, or the servant of any such ambassador, resident agent, or other public minister, or any other person not liable by law to pay such rate or assessment, should thereafter inhabit, should be paid by, and recoverable from the landlord or proprietor of every such house, building, coach-house, stables, or tenement, who should for that purpose be deemed the occupier thereof.”

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The case was argued by *Shepherd* Serjt. for the Plaintiff, and *Lens* Serjt. for the Defendant.

MANSFIELD C. J. The only doubt in this case arises on the clause which gives the power of rating, *s.* 38., which speaks of all and every person and persons who shall inhabit, hold, use, occupy, possess, or enjoy any property within the limits. Taking those words by themselves, certainly they might be supposed to extend to be compulsory on all and every person who has any sort of interest in the houses or land, and if the purview and general provisions of the act had shewn that it was the object of the legislature to tax all who had any interest in the houses or land, it might be construed to mean all ; but I rather think that even then, on a strict construction, it would not comprehend the landlord, who has the legal possession but does not inhabit, but only the inhabitant,

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him who inhabits, who holds, who possesses, who uses, who occupies, who enjoys in the ordinary acceptation of the words. I should rather think therefore it would only apply to inhabitants. But then comes the section that an uninhabited house shall pay only half. It would, to be sure, be a monstrous and extraordinary construction, that a house which was unproductive, and a mere source of expence, should pay the whole rate, when a house, after having been productive, but again rendered for a time unproductive, should pay half the rate. Next, in the clause respecting ambassadors, why does the legislature use the words that the landlord should "for that purpose," *i. e.* for the purpose of paying the rate, "be deemed the occupier thereof," why so, if the landlord is, in the general view of the act, liable? Upon these words a strong ground arises, that the legislature meant inhabitants only to be liable. Another inference arises from the clause in *f. 2.* for the election of governors, which vests it in the inhabitant householders who have paid up their rates, and enables them to elect 21 male persons. There is nothing mentioned here of the owners of houses, only of the inhabitant householders who have paid up their rates. Another provision confirms this view of the subject, *f. 60.* Any inhabitant residing within the limits of this act, and any governor or guardian who shall be liable, shall be allowed to give evidence. It says nothing of the landlord of a house; it is therefore supposed that the landlord is not liable to pay the rates, for if the lessor was liable to pay the rates, there would be as much reason to qualify him to be a witness, from which he would at common law be excluded by his interest, as there is to qualify the inhabitants. It therefore seems to me that the landlord is not liable before the house is let.

HEATH

HEATH J. I am of the same opinion. There seems to be great indongruity in supposing that a person who has a house which was never inhabited, is to pay the whole, and that when it is untenanted he is to pay half. As to the 38th clause, I think the strong contrary inference arises: here, as in residuary devises, the first word, inhabitants, controuls the subsequent words. If a testator devises all the residue of his estate and effects, it will carry all his real estate, as well as his personal; but if he begins by enumerating his watch, plate, jewels, &c., and then follows them with the words estate and effects, that will not pass his real estate. I think therefore the rate is only to be assessed on the inhabitants, and that it does not extend to the present case.

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CHAMBRE J. It is quite unnecessary to go through these several clauses, every one of them shews what the legislature meant. And the construction contended for would be attended with this absurdity, that it might be evaded by the owner's letting his house for a week.

GIBBS J. Probably it was the meaning of those who penned this act, that houses, as soon as they were fully finished, should pay the rates, but on account of the difficulty of ascertaining when a house should be deemed completely finished, they have made the receiving a tenant the test of it. I agree with my Brothers that the word inhabitant governs the other words in that clause; and I think, (as *Heath J.* also said he did,) that "hold, occupy, possess, and enjoy," refer to wharfs, warehouses, and matters not capable of inhabitancy, situate within the district. I agree with my Brother *Lens* that the words are capable of being extended to comprize landlords who hold without in-

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habiting, but I think the purview of the act requires the contrary construction.

Judgment for the Plaintiff.

November 18.

FEISE v. PARKINSON.

If a policy be avoided by a misrepresentation made without fraud, the assured is entitled to a return of the premium.

New trial not to be granted on the mere affidavit of one party contradicting the witnesses on the other side.

THIS was an action upon a policy, at and from *Hamburg*, or any port or ports in the *Elbe*, to *London*, or any other port or ports of the *United Kingdom*. Upon the trial of this cause at *Guildhall*, at the sittings after the last *Michaelmas* term before *Mansfield* C. J., the Plaintiff proved the subscription, loss, and interest; and the Defendant rested his case upon a misrepresentation made to the first underwriter at the time of effecting the policy, to whom, as it was sworn by the broker, the Plaintiff had stated that the ship had both an *English* licence and a *French* imperial licence, whereas the fact was, that the ship had an *English* licence, and a *French* pass from *Cuxhaven*, which enabled her to come down the *Elbe* from *Hamburg*, and put to sea without molestation at *Cuxhaven*, but by no means operated as a licence to her to trade with *England*; and it was sworn that the circumstance of having a *French* imperial licence, made a considerable difference in the amount of the premium of insuring such a voyage at the time when this policy was effected. The jury found a verdict for the Defendant.

Shepherd Serjt. in *Hilary* term last moved for a rule nisi to set aside the verdict and have a new trial, upon an affidavit of the Plaintiff that the broker who gave testimony to his representation of the ship having a *French* imperial licence, was totally mistaken in that point,

point, and that the Plaintiff's representation upon that head was, that the ship had a *French* pass, as the proof shewed that she had. He also swore that at the time of effecting this policy, *French* imperial licences had not been heard of at *Lloyd's*. Secondly, *Shepherd* contended, that if the Plaintiff were not entitled to a new trial, he was entitled to a verdict for a return of premium; for that if there had been any misrepresentation, it was clearly not fraudulent, but originated in mistake; and if a person without fraud represents circumstances which prove to be not true, this is, like the case of a warranty not complied with, a ground for recovering back the premium, inasmuch as the risk has never been incurred. If this were not so, a representation would have greater effect than a warranty. The Court granted the rule in the alternative embracing both points.

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Lens Serjt. in this term shewed cause against the first part of the rule, upon the evidence which had been given at the trial; and the Court were of opinion that the mere affidavit of the Plaintiff alone, unsupported, was not a sufficient ground to grant a new trial; upon the second point, he contended, that where there had been a misrepresentation, whether fraudulent or not, the Plaintiff could not be entitled to a return of premium; thirdly, that the Plaintiff was precluded because he had not claimed it at the trial.

GIBBS J. Where there is fraud, there is no return of premium, but upon a mere misrepresentation without fraud, where the risk never attached, there must be a return of premium. This business is conducted on the part of the assureds, with the utmost imprudence; these transactions are done by parol between the Plaintiff and Defendant, the broker only present, and on which side his interest leans, if he be dishonest, all know; as long

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as it is the law, we must admit it; but this is one, among other proofs, of the mischievous tendency of admitting parol evidence of what passes at the time of making written instruments, to control them. It is clear, that the Plaintiff is not entitled to a new trial on the first ground. I think it equally clear, that the Plaintiff is entitled to enter his verdict on the count for money had and received for the premium, but as the return of premium was not claimed at the trial, that cannot be done without the Defendant's consent. Upon the other counts, the verdict must be for the Defendant: if the Defendant will not consent, the Court must grant a new trial generally.

On the following day, *Lens*, after consulting his clients, consented to the Plaintiff's taking a verdict for the premium; and that branch of the rule was therefore made Absolute.

November 18. J. W. ORGILL, Administrator of ANN ORGILL,
v. KEMSHEAD.

A lessee cannot plead to covenant for rent, an assignment, and tender by the assignee.

THE Plaintiff declared in covenant for rent arrear upon an indenture of lease, whereby *Ann Orgill*, deceased, demised to the Defendant and his assigns, certain premises, for the term of 35 years, wanting 14 days, yielding the yearly rent of 6*l.*, payable quarterly; and averred the Defendant's entry, the lessor's death, and the Plaintiff's title as her administrator, and the accruer of the rent to himself since her death. The Defendant pleaded, secondly, that after the making of the said indenture, and before any part of the rent became due or in arrear to the Plaintiff, on the 23d day of *August* 1804, he the Defendant duly assigned, transferred, and set over to *J. Robinson* all the estate, title, interest, terms of years then

then to come and unexpired, profit, claim, and demand, of him the Defendant, of, in, and to the demised premises, by virtue of which assignment *J. Robinson* entered and became possessed for the residue of the term then to come therein and unexpired; he then averred a similar assignment by *Robinson* to *Baker*, and his entry and notice to the Plaintiff. And that *Baker*, after the last mentioned assignment, and always, from the time when the rent in the declaration mentioned became due and in arrear, hitherto, had been and still was ready to pay the same to the Plaintiff, and that he, *Baker*, before the suing forth of the Plaintiff's writ, on the 31st of *March* 1812, tendered and offered to pay the same to the Plaintiff, for the arrears of rent, which sum the Plaintiff refused to receive from *Baker*, and the same sum was now brought into court, ready to be paid to the Plaintiff, if he would accept it. To this plea the Plaintiff demurred, and the Defendant joined in demurrer.

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The demurrer was argued by *Marshall* Serjt. for the Plaintiff, and *Lees* Serjt. for the Defendant.

MANSFIELD C. J. There is no pretence to say that this is a good plea, for if it were, the lessor might be compelled to accept an assignee contrary to his inclination, and to lose his action of debt. The point is too well settled to bear an argument.

CHAMBER J. The pleader himself is distressed in drawing the plea, for he does not say in his *profert* that the Defendant brings the money into court, or that the assignee brings it into court, he only says it is brought into court.

Judgment for the Plaintiff.

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COOKE, Plaintiff;

Deforciant.

In a recovery where the original writ is insensible, the Court will permit it to be amended.

SHEPHERD Serjt. moved to amend a fine by inserting in the precipe the words "that justly and without delay they perform to *John Cooke* the covenant made between them of," those words having been omitted; so that it ran thus, "command the deforciant's two messuages, &c."

The Court granted the application, saying, that in such a case they could amend by common sense.

November 19.

AUSTEN v. CRAVEN and Another.

The Defendants contracted to sell to *K.* 50 hogheads of sugar, called double loaves, at 100s. per cwt., to be delivered free on board a *British* ship: *K.* sold to the Plaintiff by the same description, and the Defendants assented to the resale, the sugar not having been delivered or weighed: Held that the Plaintiff could not recover for it in trover against the Defendants, the first vendors.

THE Plaintiff's declaration contained two counts in case, founded on a breach of the duty which he averred to arise out of a sale made of sugars by the Defendants to *Kruse*, and a further sale by *Kruse* to the Plaintiff, and also a count in trover for sugars. Upon the trial of the cause at the sittings after *Hilary* term 1812, at *Guildhall*, before *Mansfield* C. J., it appeared that the Plaintiff had in his two first counts incorrectly described the contract: it therefore became a question whether the Plaintiff could recover in trover under the following circumstances. On the 7th of *December* 1809, the Defendants, who were sugar refiners, entered into a contract to sell to *Renol! Dresden*, (who was the clerk of, and bought for the use of *Kruse*,) 50 hogheads of sugar, the quality of which was described as being double loaves, at 100s. per cwt., 50 hogheads of the quality described as *Turkey B.* at 85s., 50 hogheads of the quality called *Turkey C.* at 75s., and 50 others of the quality

quality called *Turkey A.* at 108s, to be delivered free on board a *British* ship. They were to be paid for at the expiration of four months, allowing two months interest, the seller paying all expences up to the 1st day of *April* 1810; after that time, if not shipped, the buyer was to pay expences; and it was agreed that *Kruse* should give the Defendants his guaranty in writing for *R. Dresden*. The seller of sugars, upon delivering them on board a *British* ship for exportation, becomes entitled to receive a considerable drawback, which is paid him by the government. The appellations given to the several parcels of sugar, denoted certain qualities of sugar known in the trade. *Kruse*, being in embarrassed circumstances, on the 30th of *January*, not having then named any *British* ship on board of which the sugars or any of them should be delivered, nor having paid for them, and no part of them having been delivered, he resold to the Defendants, at an advanced price, the 150 hogsheads lastly named in the original contract; and shortly after he contracted to sell to the Plaintiff the 50 hogsheads of double loaves, and gave the Defendants an order to deliver them to the Plaintiff. The Plaintiff gave notice to the Defendants of his intended contract, and enquired whether they had 50 hogsheads of sugars belonging to *Kruse*, and whether he the Plaintiff might safely purchase them of *Kruse* and pay him the price, to which they answered in the affirmative, and said that they had the 50 hogsheads, and would deliver them. The Plaintiff thereupon paid *Kruse* the price at which he had contracted for them, and required the Defendants to deliver them, which they, being unable to obtain payment from *Kruse*, refused to do, whereupon the Plaintiff brought this action; and it was urged for him, that although ordinarily a vendor has the right to detain the goods which he contracts to sell, until he is paid for them, yet that these Defendants having told the Plaintiff

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1812. Plaintiff that he might safely buy and pay *Kruse*, could not afterwards set up that lien. For the Defendants it was objected; that no specific 50 hogheads had been so separated from the Defendants' stock, as to enable the Plaintiff to recover in trover. The jury found a verdict for the Plaintiff, subject to this objection, which was reserved by the Chief Justice; and in *Easter* term, *Shepherd* Serjt. obtained a rule *nisi* to set aside the verdict and enter a nonsuit, against which,

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Vaughan Serjt. now shewed cause: he relied chiefly on the case of *Whitehouse v. Frost*, 12 *East*, 614. where, after a purchase of 40 tons of oil in one cistern, and a resale of 10 tons thereof, it was held, that the purchaser of the 10 tons could recover for them in trover, without any previous separation. [The Court manifested considerable doubts upon that decision: and *Heath J.* asked, if 10 tons had leaked out of the cistern, to whom those 10 tons should be deemed to belong?] *Harman v. Anderson*, 2 *Camp. N. P.* 243. After an invoice of goods lying in a warehouse at a wharf, and an order to the wharfingers to deliver them to the vendee, and an actual transfer made in the wharfinger's books to the name of the purchaser, it was held that the right of stoppage *in transitu* ceased; and the like law, although the wharfinger had not made a transfer in his books. It appears by the Defendant's admission, that these goods had been separated from the bulk of their stock, for they said they had the 50 hogheads belonging to *Kruse*, which they would deliver to the Plaintiff. If they had any 50 hogheads of that quality in their warehouse, they must, after that declaration, be deemed to have appropriated them to the Plaintiff, and could not say that they were not his property. [*Gibbs J.* Their language is explained by the other evidence: their admission is, that they have entered into a contract for the sale of 200 hogheads to *Kruse*,

Kruse, out of which they will deliver these 50 in part performance.] The weight of hogheads of sugar varies but little, and is well known in the market; and every thing is to be intended in support of a verdict.

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Shepherd and *Best* Serjts. in support of the rule. It is not the usage of the trade to pack the loaves which the refiners manufacture, into hogheads, until they are wanted to be so packed for the purpose of exportation; and it by no means follows, because a manufacturer who agrees to furnish certain goods, and to pack them in a particular way, happens to have one parcel of goods of that description so packed at the time of making his contract, that the contract shall therefore attach upon that very parcel. This is merely a contract for certain quantities of sugar of certain qualities, not in existence at the time of the contract. In the sale of the oil were several ingredients not found here. First, it was, from the date of the contract, to be at the purchaser's risk; next, the specific oil was in existence, contained in a particular place and vessel named; thirdly, *Dutton* and *Bancroft*, the original owners, had made a complete transfer of the whole 40 tons to the *Frosts*; whereas here, even if the sugars contracted for existed *in specie*, there was nothing like a delivery to *Kruse* of the possession, nor had *Kruse* ever done that which was necessary to entitle himself to the possession. The Plaintiff too demanded a simple delivery of the goods, whereas, in order that the Defendants might avail themselves of the drawback, he had no right to require the sugars to be delivered elsewhere than on board a *British* ship, which he omitted to name: that stipulation is introduced into the contract for the Defendants benefit. Nor could the price be ascertained until the sugars were weighed off, which had never been performed; for different hogheads of sugar vary much in weight, and the goods are

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sold at so much per cwt. *Hanson v. Meyer*, 6 East, 614. But, what is stronger, there is no proof that the Defendants ever had any sugars of this quality in a state capable of being weighed.

MANSFIELD C. J. What the Plaintiff's counsel says would have been an answer to the objection, if there had been a specific quantity of loaves in *effe*, although it was part of the contract that they were to be delivered on board a *British* ship, there would have been conversion enough. But certainly, upon the evidence, there is no answering the objection. Trover cannot be maintained but for specific goods. Any sugars of required quality would have satisfied this contract. It is a contract for a certain quantity of a specified quality of sugars. I say nothing on the case of the oil; there it is held that trover will lie for a specific quantity of a liquid, mixed with a certain other quantity of the same liquid, without its ever having been separated; how it is to be distinguished from the mass, I know not; but that case stands quite on its own bottom: it is unlike other cases.

GIBBS J. We need say nothing on that case, suffice it, that it is very distinguishable from this.

Rule absolute.

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LESLIE v. POUNDS.

Nov. 19.

THIS was an action upon the case, brought against the

Defendant for negligently permitting the entrance of his under-ground cellar, situate in a public footway, to be uncovered during the night, *per quod* the Plaintiff fell into the cellar and was hurt. The first count alleged that the Defendant was in possession of the house and cellar; the second averred, that the Defendant opened the cellar door, and negligently left it open. Upon the trial of the cause at *Westminster*, at the sittings after *Hilary* term last, before *Mansfield* C. J., the evidence was, that the Defendant was the proprietor of the house, and *Daniels* his lessee; that the latter, who used to inhabit the house, had ceased so to do about six months before the action brought, for the purpose of having it thoroughly repaired, which was done at the expence of the lessee, but under the superintendance of the Defendant the lessor: no person slept in the house at the time when the mischief occurred, but *Daniels* had some coals in the cellar, and paid rent for the house throughout the time. On the evening of the mischief the cellar door had been fastened down, and there was no evidence how it afterwards became open: there was no other evidence of the lessee continuing the possession. The falling door had been broken off for some time past, and the commissioners of the pavement had remonstrated with the Defendant on the dangerous state in which it was left: he promised to take care of it, and had put down some boards over the cavity as a temporary covering. *Lens* Serjt, for the Defendant, objected that *Daniels* was the person who was in possession of the house, and was therefore to be answerable for the

Cause lies against the landlord of a house demise by lease, who, under his contract with his tenant employs workmen to repair the house, for a nuisance in the house occasioned by the negligence of his workmen.

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misconduct of the inferior workmen, by whose negligence it must be supposed that the door was left open. The jury, however, found a verdict for the Plaintiff for 20*l.*, subject to the point reserved.

Lens Serjt., in *Easter* term 1812, had obtained a rule *nisi* to set aside the verdict and enter a nonsuit.

Shepherd Serjt. now shewed cause. The Defendant had the actual possession for the time, which rendered him liable, he had the sole management and disposition of the house, and was the person with whom the commissioners of the pavement had been disputing about making the way impassable and dangerous. This is not like the case of a person who lives in a house and employs a builder under him. Although this tenant might, for some purposes, bring trespass, yet as he had given up the temporary possession to his landlord, his landlord was the person liable to the public upon this occasion. As to the second count, although it is charged that the Defendant did the act, it is not necessary to prove that it was done with his own hand: it is enough if he was the principal who employed the builders. If the action had been brought against *Daniels*, and there had been proof of the mischief being done by the workmen of the Defendant, inasmuch as the Defendant is not employed by *Daniels* as an agent to repair the house, but repairs it for himself, and is, (though the lessee defrays the expence,) to have the benefit of it, he must be answerable. Although in the case in 1 *Bos. & Pull.* 404., *Busb v. Steinman*, it was held an action would lie against the principal for mischief done by a servant of his agent, yet that does not decide that the action does not lie against the agent. As, if a ship be run down, an action lies either against the

the ship owner, or the captain who is not the ship owner, although the captain might be asleep in his cabin. And therefore even if the Defendant were not in possession of the house, he is the person to whom must be imputed the acts of negligence done by the subordinates employed by him.

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Lens and *Frere* Serjts., *contrà*. The two counts stand on wholly different grounds, and must be disposed of separately. As to the possession of this house, *Daniels* had merely gone out of it to the very next door, on account of the inconvenience of living in it during the process of the repairs. *Daniels* might bring trespass. There is no pretence that there was a joint possession. Nobody slept in the house. The chief evidence of any possession is, that *Daniels* had it: he had it before the repairs began, he still kept his coals there, and still paid rent, and if his furniture was removed, it was because it would otherwise be spoiled by continuing there during the time of doing the repairs. The Defendant was only an agent: he had licence to enter for doing these repairs, but never had the actual possession. If premises are in an unsafe state, and there is no evidence how they became so, the law throws the liability on the occupier. That disposes of the first count. On the second count, first, the Defendant is not the person who actually did the mischief; secondly, he is not answerable for the acts of the workmen, unless he were himself the principal, and not the agent: here he is the agent. *Busk v. Steinman* is favourable to the Defendant rather than to the Plaintiff, for it was there ruled, that an agent is not answerable for the acts of his subordinate agents, with which it is here sought to charge him. *Stone v. Cartwright*, 6 T. R. 414. *acc.*

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MANSFIELD C. J. This is certainly a very singular case. It is not necessary to decide whether *Daniels* or the Defendant was the possessor. There is a strong argument, certainly, to say that the possession is in *Daniels*, not in the Defendant; but the Defendant takes on himself these repairs, not as the agent of *Daniels*, but as the landlord of the house. He alone is the judge of what repairs shall be done, and though *Daniels* pays for the repairs, yet if the repairs are done substantially, the Defendant will have the benefit of it; the Defendant determines what the repairs shall be, and directs the repairs; he therefore is the principal, and as a principal, is answerable for the acts of the persons he employs. And the Defendant's own language shews that he considered himself as the person whose business it was to look after this, for when he is told of the dangerous state of the property, he says, "never mind, I will take care of it." He is liable for this on this second count. We think therefore that this verdict may stand on the second count.

Rule discharged.

Nov. 20.

PIRIE and Another v. ANDERSON and Another.

The original certificate of a ship's registry is no evidence for the Plaintiff upon a policy of insurance, that the interest in the ship is in the persons in whom

it is averred, and for whom he effected the insurance as agent.

Property in a ship must be proved by evidence of possession in the Plaintiff, his vendors, or bailees, accompanied with a certificate of registry.

at

at *Guildhall*, at the sittings after *Hilary* term 1812, before *Mansfield* C. J., it appeared that the ship had been lost, and in order to prove the interest as averred, the Plaintiff called the registrar of the port of *London*, who produced in evidence the original register of the ship, which, in consequence of the loss, had been deposited at the custom-house, in pursuance of the statute 26 G. 3. c. 60. It purported to be made upon the oaths of *Crawfurd*, *Kerr*, and *Cornfoot*, all of *Greenock*, as having all taken and subscribed the oath required by the statute 26 G. 3. c. 60. and as having sworn, that they were the sole owners of the ship *Ann*, of *Greenock*. But the affidavit upon which this registry purported to be made was not produced, so that there was no other evidence of these persons having sworn they were owners, than this instrument, stating that they had so sworn. The register being objected to, as not constituting even *prima facie* evidence that those persons were the owners of the vessel, the Plaintiff tried to strengthen his case, by proving the exercise of acts of ownership by the parties interested, but it amounted to no more than this, that *Cornfoot* had gone to the ship's broker to talk with him about stopping the cargo as security for the freight, which, as *Gibbs* J., upon discussing the rule for a new trial, observed, not being followed up by any act, amounted to nothing; and that *Cornfoot* had given instructions for inserting the names of all the three as owners, in the bond required by the register act. The jury found a verdict for the Plaintiff, *Mansfield* C. J. reserving the point, whether this certificate of registry were admissible as evidence.

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In *Easter* term 1812 a rule *nisi* to set aside the verdict and enter a nonsuit was obtained by *Pell* Serjt.; against which

Shepherd and *Best* Serjts., in this term shewed cause. They contended that this case was materially distin-

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guishable from those of *Frazer v. Hopkins*, ante, 2. 5. and *Tinkler v. Walpole*, 14 East, 226., because in the first of those cases it did not appear upon whose oath the certificate had been obtained, nor that the person registered as owner was in any way privy to the registration; in the latter case, it did appear that the party sought to be charged was registered as owner upon the oath of another, and not of himself; but in this case the certificate proved that the persons in whom the interest was averred, had taken an oath that they were owners, by which they charged themselves as owners, and made themselves liable to all the world, for all matters, in respect whereof owners of that ship might be liable: it was therefore evidence for all purposes that they were owners; and Bayley J., in *Tinkler v. Walpole*, drew the distinction between the case, which was then under the consideration of the Court, of a person sought to be charged, and "the case of a person publicly asserting that he was owner by the act of registering a vessel in his own name: that," the learned Judge said, "might be *prima facie* evidence for him that he was owner, because he thereby publicly challenges all persons that he is so." In the case of *Robertson v. French*, 4 East, 130. Lord Ellenborough C. J. held mere possession, and the exercise of ownership, to be sufficient interest. [*Gibbs J.* In that case there was an actual possession.] *Cornfoot* has the actual possession of this vessel. [*Heath J.* That can be evidence as to him alone.] These persons, who go to the custom-house, take an oath, and register the vessel as their own, thereby exercise as solemn and decisive an act of ownership as the nature of the subject matter admits of. Or, if there were a doubt whether the officer's entry were evidence of their having done that act of ownership, their permitting the Plaintiff to aver interest in their names is proof of their assent to the registration.

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The legislature have themselves said, that there can be no ownership of a *British* vessel, without a registration; and in saying that, they have necessarily said, that a registration properly authorized by the parties, shall be the conclusive, and indeed the sole evidence, of ownership. It will be attended with extreme inconvenience if this species of evidence is rejected; for it is impossible for a ship-owner to adduce any other. It would be vain for him to proffer the bill of sale conveying the ship from his vendor to himself, for it would still be equally incumbent on him to shew how his vendor became entitled to the ship, so that the enquiry would be endless; and besides, since the register act, a bill of sale is not evidence of title. *Ex parte Tallop*, 15 Ves. 66. Lord Eldon Chancellor, says, "these two acts of parliament were drawn upon this policy; that it is for the public interest to secure evidence of the title of a ship from her origin to the moment in which you look back to her history." And again; "There is no doubt, that if the person contracting for the purchase, had taken possession, and effected insurances, and afterwards brought an action upon the policy, averring that the interest in the ship was in him, though I agree with Lord Ellenborough, in *Robertson v. French*, that it is sufficient *prima facie* to shew that he dealt as owner, yet if it appeared in the course of the examination of witnesses, that he was entitled only under an equitable contract, under those circumstances a court of law would say the averment was not made out by the evidence." It has always been the practice of the Court of King's Bench to receive entries of registration as evidence for this purpose. [*Gibbs* J. They have been a thousand times received there, by consent, because it saved three or four hours in the trial of a cause to admit them as *prima facie* evidence of a fact the truth of which no one doubted, but it was never determined that they were

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evidence: no one in that court ever doubted but that a man's saying he had title, was no evidence of his title. It resembles the case of enrolling a deed: a person cannot by enrolling it, prove that he has a good title.]

Pell Serjt. contrd. Even if there had been proof, which there is not, that this registration was made on the oaths of the persons averred to be interested, it would not be admissible evidence. The sanction of an oath will not make any man's declaration to be evidence of his own title. This is not, as it has been supposed, a document of a public nature, proving of itself that all the facts therein averred are true: if it were, the copy of it would be evidence, as is the copy of any other record, without producing the registration itself. Since the trial of this case, the same point has been decided in favour of the Defendant by Lord *Ellenborough* C. J. in the case of *Flower v. Young*, 3 *Campb.* 240. That was an action for goods sold: the Defendant pleaded in abatement, that the goods were sold to others jointly with the Defendant. It appeared upon the trial of the issue joined on this plea, that the goods were stores furnished for the use of a ship, of which the other persons named in the plea were said to be part owners, and the Defendant attempted to prove this fact by the production of the certificate of the ship's registry; but Lord *Ellenborough* C. J. held that it was no proof of ownership.

MANSFIELD C. J. It will be a great inconvenience to discontinue the practice of receiving these documents, and I wish that by act of parliament the register was made *prima facie* evidence. But on looking through my notes, it is impossible to say that I see any thing like evidence of ownership in the parties. I am very sorry the objection has been taken; there was nobody in the court who had any reason-

reasonable doubt of these persons being the owners, but there can be no doubt but that the register is not legal evidence of the ownership, and therefore the objection must prevail.

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HEATH J. A ship's register is not a public instrument, it is an instrument of a private nature.

CHAMBRE J. The acts done by *Cornfoot* are only evidence, so far as affects himself; and there is no circumstance affecting the other two; for *Cornfoot's* going, and giving in the three names for a joint bond, is not evidence against them. There is no evidence of possession in them.

GIBBS J. No Judge who tried this cause could fail to feel the strongest inclination to prove the Plaintiff's case; but the objection has been taken, and must be decided according to law. It has been asked by the counsel for the Defendant, how property in a ship is to be proved? How was it proved before this statute? By proving actual possession in the Plaintiff, or in those to whom the Plaintiff had committed it, or in those from whom the Plaintiff had derived his title. Any one of these ways will now suffice, accompanied by the evidence of the registry, in order to make the other evidence admissible. It was strongly urged for the Defendant, that because the title cannot be complete without the register, therefore the register shall be *prima facie* evidence of the title; that does not at all follow. If the legislature makes an act necessary to complete a title, it does not thereby make that act alone to be proof of the title; if such were the law, a man might make for himself a title to any thing in the world. With respect to the *dictum* of *Bayley J.*, I am satisfied he said that because he would not take on himself to decide a point which had

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had never been decided, which was not the point raised at *nisi prius*, and which it was not necessary to decide in that case.

Rule absolute for a nonsuit.

Nov. 21.

BARRETT v. PARRY.

If an arbitrator has power to enlarge the time for making his award to any other day, the Court will expound it to mean to any other days.

Quere, whether an award upon the reference of an action, directing the payment of costs of the award, without fixing the amount thereof, is bad in that point for uncertainty; or whether the amount may not be taxed by the officer of the court.

VAUGHAN Serjt. moved to set aside the award of a gentleman at the bar, made in pursuance of an order of reference at *nisi prius*, upon two grounds; first, that the *ita quod* being that the arbitrator should make his award before the 10th of *November*, or any other day to which he should enlarge it, he had first enlarged the time, and then, after the 10th of *November*, and before the expiration of the period for which it stood enlarged, had enlarged it again, and had not made his award until after the day to which the time was first enlarged: this was a power which, like other powers, was to be construed strictly; and though the terms enabled the arbitrator to enlarge to any one day he might think expedient, yet it was to one day only; and he having enlarged the time to some one day, was thereby *functus officio*, and could not again enlarge to another day. The Court decided, as they had before done in the case of *Payne v. Deackle*, ante, 1. 509., that this was no excess of the arbitrator's power. The second objection was, that the arbitrator had, according to the most usual practice of the bar, not named in his award any sum to be paid for the costs of the award; although he had directed that the Defendant should, in the first instance, pay the costs of the award, and that the Plaintiff should repay him one moiety thereof. The Defendant alone took up the award, and paid the arbitrator's whole fee, including the stamps: the Plaintiff had refused to repay

him a moiety thereof. The amount of the arbitration fee, which was mentioned in making this motion, did not appear to be unreasonable, nor was it now complained of as such, and the Plaintiff had been neither attached, nor sued for the moiety; but being dissatisfied with the award, he now sought to set it aside altogether, as being, in this particular, uncertain; contending that the amount of the costs of the award could not be rendered certain, by any subsequent matter, as the costs of the action could be, because the prothonotary had no power to tax or allow the amount of the costs of the award.

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The prothonotary, who was present, claimed jurisdiction in such a case: he said he had, upon the taxation of the costs of the action, which were governed by the event of the award, expressed an opinion to the parties, that where the arbitrator by his award fixed the amount of the costs of the award, he, the prothonotary, had no power to alter the sum, but he thought that where no sum was fixed, his office enabled him to assess what was reasonable.

The Court abstained from giving any opinion upon this point (a), but said it was a very unhandsome application. There were obvious motives of delicacy which might restrain an arbitrator from naming a sum for the costs of the award. If the objection, however, were to prevail, it was clear, it could not be necessary to disturb the whole of the award for a mistake in this particular. But the Plaintiff, at all events, was not hitherto injured, and came *quia timebat*. If the Defendant should commence his action, or issue his attachment, to enforce the repayment of the moiety of the costs of the award, it would then be time enough for the Court to discuss whether the action or attachment could be supported; and they

Refused the rule.

(a) But see *Fitzgerald v. Graves*, *post*. v. 342.

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KEYSER v. SCOTT.

If a vessel is taken at her moorings, being neither within the *caput portus*, nor within that part of a haven where ships unload, the underwriter is not discharged by a warrant against "capture in the ship's port of destination."

THIS was an action upon a policy upon the ship *Jafon*, at and from *London* to any port or place in the *Baltic*, with liberty to seek and join convoy, carry and change simulated papers, to touch and stay at all ports or places in the *Baltic* or elsewhere for orders or information, and in case the master should find it dangerous to enter any port or place, to return. And the ship was warranted free from capture in her port of destination. The cause was tried before *Mansfield C. J.* at *Guildhall* at the sittings after *Hilary* term 1812., when it was proved that the *Jafon* came to an anchor over against *Pillau*, on the outside of the bar, at the distance of full a *German* mile further out than any place where vessels ever are known to lighten their cargoes in preparation for coming in over the bar. While she was lying there, she was taken by a boat with some *Pomeranian* soldiers, coming out of *Pillau*. They took out no part of her cargo at the place where she then lay, but carried her in, until she was within a *German* mile from the shore, where they took out the first part of her cargo: the place where ships usually begin to unload is a *German* mile from the shore. The jury found a verdict for the Plaintiff; and *Lens* Serjt. in the following term obtained a rule *nisi* to set aside the verdict and enter a nonsuit.

Shepherd and *Vaughan* Serjts. who would on this day have shewn cause, were stopped by the Court, who appealed to *Lens* and *Marshall* Serjts. whether admitting that which was questioned, that the vessel had brought to in *Pillau* roads, intending to make *Pillau* her port of destination,

destination, and not merely a port of enquiry, as under the terms of this policy she had a right to do; it was possible for them to support their rule? They contended that the vessel had arrived at such a place that the underwriter was within the protection of this warranty; for that any place where the vessel was intended to terminate her voyage was her port of destination, and by the master's casting anchor, and going on shore in an open boat, he made an election for the assurance, that the place where the ship anchored should be her port of destination. They relied on the ample interpretation which had been put on the words "port of discharge" by the Court of King's Bench in the cases of *Jarman v. Coape*, 13 *East*, 395., and *Dalglish v. Brooke*, 15 *East*, 303. In the harbour of *Pillau* there was a shifting bar, so that if a local and a rigid construction were put on the word port, the same moorings would not be within the port on one day, which would on another, which would be inconvenient.

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MANSFIELD C. J. I have no doubt the underwriters intended to protect themselves against the risk of that loss which has occurred, but unfortunately they have used terms which do not protect them. They have unfortunately referred for their definition of the risk, to the place where the capture was to be made, and the place where the capture was made, is, according to the only witness who knew any thing about it, in the open sea. If the underwriters will not be more careful how they express their meaning, they must suffer for it. The rule must be discharged.

GIBBS J. In a case tried before me at the sittings after the last term, I directed the jury, that if the ship was neither within the port in its ordinary acceptance,

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nor in a place where ships had ever been known to unload, she could not possibly come within the warranty; and when my Brother *Shepherd* moved in this term to set aside the verdict found for the Plaintiff, upon the ground that my direction was wrong, the Court refused the rule: how then can this rule prevail? The case of *Dalglish v. Brooke* will not bear out this Defendant. Lord *Ellenborough* C. J. goes no further than this, he says, "the meaning of the parties was, that the underwriters should not run the risk of seizure in the elected place of discharge, wherever that might be." The only witness who spoke of the place where this ship was taken, said it was on the high seas.

Rule discharged.

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. REYNER v. PEARSON.

Whether a vessel warranted free of capture in port, be in a port or not at the time of her capture, is purely a question of fact for the jury.

Letters written to the assured by his agent or correspondent on the continent, are not admissible as evidence against him.

THIS was an action upon a policy of insurance at and from *Heligoland* to any port or ports in the *Baltic*, against all risks of whatever description, and until the goods were safely warehoused in the warehouse of the consignee, or his agent, including all risk in crafts to and from the ship, with liberty to proceed backwards and forwards, touch and stay at all ports and places in the *Baltic*, or elsewhere, for orders, for information, or for other purposes, with liberty to carry and exchange simulated papers and clearances, upon goods by the ship *Constantia*; with liberty to declare and value there-after warranted free of seizure and capture in port. Upon the trial of this cause, at the sittings in *London*, after *Hilary* term 1812, before *Mansfield* C. J. it appeared that the *Constantia*, having come to an anchor about

about six *German*, or 20 *English* miles, from the port of *Swinnemund*, drove from her moorings, and brought up again on the 1st of *November* at the distance of a *German* mile and a half, or six *English* miles, from *Swinnemund*, with the loss of a mast and an anchor: no vessel lying at that spot had ever been known to unload there, or to lighten her cargo there in preparation for coming over the bar: lighters were not permitted to come out so far: the captain was on shore on the 7th of *Nov.* and again on the 16th; during his stay, the wind as often set out to sea, as it set in to the shore: the weather was generally tempestuous from the 7th until the 16th, and the ship was not repaired before that day, on which, a pilot boat with some soldiers from *Swinnemund* came off, and captured her, and took out about 160 bales of her goods in the place where she then lay. There were read at the trial, several letters, one written by an agent of the Plaintiff's at *Hamburg*, and addressed to the Plaintiff, which stated, that the writer had given directions that the *Constantia* should try *Swinnemund* for a market; and another letter, written by another agent of the Plaintiff at *Gottenburgh*, apprizing him that the commodore commanding at that port, had prohibited the *Constantia* from going to *Swinnemund*, except upon an undertaking that she would discharge her cargo at least six miles from the shore; and a third letter, in which the same agent, writing from *Gottenburgh*, spoke of the *Constantia* as having been taken at *Swinnemund*, being forced into port by heavy gales. *Maniffeld* C. J. thought it might be a matter of doubt, supposing that the vessel were really driven by want of repairs into the situation in which she was taken, whether that would be a capture in port within the warranty, but he directed the jury, that if the ship was waiting on the outside of the port, very near it, with a determination of discharging her cargo there, that was sub-

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substantially a being in port. The jury, however, found a verdict for the Plaintiff.

Vaughan Serjt. in *Easter* term 1812, obtained a rule nisi to set aside the verdict and have a new trial, upon the ground that either the vessel was in port, at the time of the capture, for if she was evasively out of port, it was equivalent to being in port, and as she had undertaken to discharge her cargo six miles from *Swinnemund*, the place where she undertook to discharge her cargo, was her port of discharge, and therefore, as to her, was a port; or else, the captain had acted improperly and fraudulently in keeping the vessel at that anchorage, after he had ascertained, by going ashore on the 7th, that he could not obtain a market at *Swinnemund*; and this unnecessary delay was equivalent to a deviation, and discharged the underwriter.

Shepherd Serjt. in this term shewed cause against the rule; and insisted, that the letters had never been read as evidence of the ship's destination, or her place of capture; he had permitted them to be read *alio intuitu*, to explain some circumstances about another policy that had been cancelled. If read in evidence, they were not admissible.

Vaughan and *Rough* Serjts. endeavoured to support the rule, upon the grounds whereon it had been obtained: the letters, they said, were admissible evidence as representations made by an agent of the Plaintiffs.

The Court held that they were not in that or any other character admissible, as had been decided in the last term in the cases of *Langhorn v. Allnut ante*, 511. and *Kahl v. Junfen, ante*, 565.

MANSFIELD C. J. Probably I felt on this trial, as I have on many, that the captain's long delay was not well accounted

accounted for. It was the province of the jury to consider the question, whether the ship was in port or not; the jury to whom it was left, have decided it. We must take it, therefore, that they found the vessel was not in the port of *Swinnemund*: and we cannot say but that we think their decision right: for where is the ship? five or six miles from the port of *Swinnemund*! in a place, where no ships ever unload, where no lighters would come off to help to unload, quite in the open sea. The only remaining question then is, whether we can say the captain in staying here so long, acted contrary to his duty; it is said, he could have sailed sooner, because he admitted that the wind was sometimes *North* and sometimes *South*; but on the other hand, he swore, it always, from the 1st to the 16th of *November*, was tempestuous; he had lost a mast, and it might not be safe for him to sail at that time without a mast; either then, he must wait there till he could get one, or till the weather was calm enough to permit him to sail without one. The length of time did not escape me, nor, I dare say, the jury; they have found it was not fraud in the captain, and we cannot say the verdict was wrong.

GIBBS J. I am of the same opinion. There are two questions here; one on the exception: that has been decided, over and over again, in several cases here. As to the other point, there might be some ground of suspicion, but it was a question, of all others, peculiarly fit for the decision of the jury, and they have decided it: and we ought not to disturb their verdict.

Rule discharged.

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HAWKINS v. WILSON.

If bail justify without the observation of the counsel instructed to oppose them, the Court will not require them to come up again and justify *de novo*.

VAUGHAN Serjt. moved, on behalf of the Plaintiff, that the bail in this case might, at the costs of the Plaintiff, come up at the sitting of the Court on the following day, to justify again, and that in the mean time the justification should not be drawn up. There were five causes by different Plaintiffs, against the Defendant, but one of the bail, who, as it was now suggested, was insolvent, having omitted to appear when called in the three first causes, justified in the other two without being observed by the counsel who was instructed to oppose the bail.

The Court held that they could not do it. The bail might not like to come up again, nor could they ask a bail whether he had been guilty of perjury on the former day.

Rule refused.

Nov. 24.

KING v. KING.

The Court will compel a Defendant in covenant on a deed which he holds, to produce it to the Plaintiff for the purposes of the cause;

It differs not that the Plaintiff seeks for inspection for the purpose of discovering some defect in the deed.

THIS was an action of covenant for rent, upon an indenture of lease, whereof only one part had been prepared, and it was executed by both parties, and was in the custody of the Defendant. *Onslow* Serjt. had, upon the authority of *Blakey v. Porter*, ante, 1. 386., obtained a rule nisi that the Plaintiff might be permitted to inspect; and, at his own expence, to take a copy of the lease, for the purposes of this cause. It did not appear that either in this case, or that cited, the lease contained a covenant by the lessee to produce the lease.

Clayton Serjt. now opposed the rule, upon an affidavit, that the Plaintiff had given out that there was some defect in the lease, by means of which, if he could obtain inspection, he hoped to set the lease aside. The Court had never yet compelled a party to produce an instrument upon which his own defect of title might appear; at least the Plaintiff ought to pay the costs of this application.

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Onslow supported his rule.

MANSFIELD C. J. I know not how to refuse the application after the case of *Blakey v. Porter*; but I am not sorry for any inconvenience that parties suffer from their evading the stamp duties by paying the expence of one set of stamps instead of two. They ought to pay for two leases. It must be understood that when one part only is executed of a deed, the party who holds it is trustee for the other. But a court of equity, I think, would not grant inspection without imposing the terms of not taking advantage of any forfeiture.

GIBBS J. If the deed, being executed by both parties, is left in the custody of one, under an engagement that it shall be produced for the benefit of both, the circumstance of what use the one wants to make of it, cannot vacate that engagement. If such inspection were not granted in other courts, as well as in this, it might deserve consideration whether the practice of the two courts should not be made to coincide; but I find that the Court of King's Bench have granted a rule that the Plaintiff may take a copy of a deed in the possession of the Defendant.

The Court made the rule absolute, upon payment of the costs of the copy, but refused to the Defendant the costs of shewing cause against the application, in which he ought in the first instance to have acquiesced.

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Nov. 24.

THOMAS v. SMITHIES.

The Court will not grant a rule to quash an insensible plea. The Plaintiff may, at his own peril, sign judgment.

BEST Serjt. moved to quash a plea in abatement, because it was insensible, suggesting, that the Defendant's intention in pleading it, was to elicit a demurrer, that he might gain time.

The Court refused the application, because they would not try the goodness of a demurrer on motion. It had been held that when a plea was quite nonsense, the Plaintiff might sign judgment, but it was at his own peril.

Rule refused.

Nov. 24.

FORTNAM v. Lord ROKEBY.

It lies on the Plaintiff to discover whether the Defendant be entitled to the privilege of peerage; and although he may have often waived the privilege, that will not make it regular to sue him by common process.

SHEPHERD Serjt. had obtained a rule *nisi* for setting aside the proceedings in this case, as irregular; the Defendant, who was a peer of *Ireland*, having been served with a common *capias*.

Marshall Serjt. shewed cause, on an affidavit that the Defendant had himself sued by the name of *Morris Robinson Esq.*, commonly called *Lord Rokeby*, and had several times been arrested upon a special *capias*.

The Court held, that his calling himself *Lord Rokeby*, was sufficient notice to the Plaintiff, to examine, before he commenced proceedings, whether the Defendant had not a right to assume that title.

Rule absolute.

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LOVEGROVE v. DYMOND.

Nov. 25.

S**HEPHERD** Serjt. having obtained a rule *nisi* for judgment as in case of a nonsuit, objected, that **Onslow** Serjt., who was for the Plaintiff, could not be heard to shew cause, because the Plaintiff had obtained an order for changing his attorney, and had not served a copy thereof upon the Defendant.

A party called on to shew cause, may oppose the rule in person, or by a new attorney, without notice to the other party of the order to change his attorney.

Onslow. The Plaintiff in person is here.

Per Curiam: The Defendant himself calls on the Plaintiff to come in and shew cause: he cannot, therefore, object to his appearance in this mode. The reason of the general rule is, that there shall be some person, whom the adverse party may look to; but the reason does not apply here.

Rule discharged.

HARFORD and Others v. HARRIS.

Nov. 25.

T**HE** Defendant, being arrested, paid into the hands of the sheriff, under the stat. 43 Geo. 3. c. 46. §. 2. the amount of the debt, and 10*l.* to cover the costs of the writ. By that section, "if the Defendant shall afterwards duly put in and perfect bail in such action, according to the course and practice of the Court, the money deposited shall, by order of the Court, upon motion, be repaid to the Defendant. But if the De-

If a Defendant, who pays the debt and 10*l.* costs to the sheriff in lieu of bail, under 43 G. 3. c. 46., puts in bail above, who, being excepted to, render him instead of justifying, the Plaintiff is not en-

titled to receive out of court, under § 2, the money so deposited.

But the Defendant may in such case receive back his deposit.

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Defendant shall not duly put in and perfect bail in such action, then the money shall, by order of the Court, upon like motion, be paid to the Plaintiff." The Defendant put in special bail, who being excepted to, without justifying, surrendered him in their own discharge; whereupon *Vaughan* Serjt., on a former day, upon the ground that the Defendant had not perfected bail as required by the statute, obtained a rule *nisi* that the money, which had been paid over by the sheriff to the prothotary, might be paid out of court to the Plaintiff.

Onslow Serjt. upon this day shewed cause, contending that the render of the principal was, according to the course of the court, equivalent to the perfecting of bail.

Vaughan, in support of his rule, urged that the statute did not leave to the Defendant who paid money to the sheriff, the alternative of rendering his person, or perfecting bail, as in other cases; but that the meaning of the legislature was, that unless the Defendant put in bail who should be allowed by the Court as capable of paying the condemnation-money, the Plaintiff might forthwith obtain the sum which had been deposited.

But *The Court* held, that the surrender was equivalent to perfecting bail, and was a substantial compliance with the directions of the statute, which was made in case of Defendants, not for the benefit of Plaintiffs.

Rule discharged with costs.

Onslow thereupon moved that the money deposited might be paid over to the Defendant: the Court granted him

him the rule, absolute in the first instance in this case, the matter having been already sufficiently discussed in considering the former rule.

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GOODTITLE, Lessee of BREMRIDGE, v. WALTER.

Nov. 25.

THE Plaintiff declared in ejectment for lands "in the parish of *West Putworth* and *Bradworthy*." Upon the trial before *Chambre J.* at the *Exeter* summer assizes 1812, the evidence was, that part of the lands was in the parish of *West Putworth*, and part of them was in the parish of *Bradworthy*, but that there was no parish in the county named "*West Putworth and Bradworthy*." *Pell Serjt.* and *Bayly*, for the Defendant, objected that the construction of the declaration was to describe all the lands as lying in one parish named *West Putworth* and *Bradworthy*, and that since it was in proof that there was no such parish, there was a fatal variance in the description of the premises. *Lens Serjt.* and *Courtenay*, *contra*, said that it was unnecessary in a declaration of ejectment to state whether the premises were in a parish, or not in a parish, they might be in an extra parochial place, or in a vill, or hamlet; and it would suffice to describe that place by its name, without describing it by the name of its civil or ecclesiastical division; in a fine these divisions might be omitted, and were rarely in practice inserted, but the premises were alleged to lie in the places described by their names only; and still less minuteness was necessary in an ejectment. The true construction therefore was, to read it as a description, of lands in the parish of *West Putworth*, and of lands in *Bradworthy*. *Chambre J.* was of opinion that under this description the Plaintiff might clearly recover the lands in *West Put-*

It is not necessary in ejectment to aver the premises to be in a parish.

If they are described as being in the parish of *A.* and *B.* the Court will construe it to mean part in the parish of *A.* and part in *B.*, *B.* being the name of a parish.

Although a Defendant succeeded upon the first trial by a forgery, the Court cannot give the Plaintiff, succeeding on the second trial, the costs of both.

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worth, and he thought he might also recover the lands in *Bradworthy*; and the Plaintiff had a verdict for the whole premises in the declaration.

Pell in this term moved, upon the same objection, for a rule *nisi* to set aside the verdict, and have a new trial. He cited the case of a variance in the name of a parish between *St. Ethelburg*, and *St. Ethelburga*, *Wilson qui tam v. Gilbert*, 2 Bof. & Pull. 281., and the familiar case of the variance between the parish of *Chelsea* and the parish of *St. Luke's Chelsea*.

In answer to the first case, the Court observed, that it materially distinguishes the name of the parish whether it were denominated from a male or a female saint, and as to the other, that it had been overruled in the case of *Kirtland v. Rounsett*, ante, 1. 570., so that it was now sufficient to describe premises as lying in any parish, by the name by which the parish is ordinarily known: but as to the principal case, it was as if any one should declare for premises in the parish of *Stepney* and *Westminster*; the word parish was mere surplusage; and they

Refused the rule.

Upon a subsequent day in this term, *Lens* obtained a rule *nisi*, that the prothonotary might allow to the Defendant the costs of the first trial, upon the ground that a lease alleged to have been made by the lessor's ancestor, upon the evidence whereof the Defendant defeated the heir's ejectment, was a forgery: the new trial was obtained upon that ground, and the Defendant had not produced this instrument upon the second trial, but pretended it was lost.

Pell on this day shewed cause. This application, if successful, would lead to mischievous consequences: in every

every case where a Plaintiff succeeds upon a second trial, the evidence given at the first would again be presented to the Court upon affidavits, for them to consider whether there might not be circumstances to give the Plaintiff the costs of the former trial.

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Lens endeavoured to support his rule.

The Court said, that if they could do it in any case, they would gladly do it in this: but there was no law which enabled them to mulct a person for his misconduct by making him pay the costs of a suit in which he had succeeded; and they

Discharged the rule

WESTON and Others v. BARTON.

Nov. 27.

THIS was an action on a joint and several bond, given by *Paul Catterall* and *John Watson* the younger, as principals, and *John Watson* the elder and the Defendant, as sureties, to *Wm. Weston* the elder, *Sir John Pinhorn*, *James Newsome*, and *Wm. Weston* the younger, the Plaintiffs, and *Wm. Golding*, since deceased, in the penal sum of 6000*l.* The condition of the bond, upon oyer, appeared to be, that whereas all the obligors had applied to the five obligees, and requested them, in their capacity of bankers, from time to time, to accept and discount bills of exchange, and promissory notes, and to advance and pay monies, for *Catterall* and *Watson* the younger, and for their use, and on their account, (such acceptances and discounts not exceeding in the whole, at any period of time, the sum of 3000*l.*) which the five obligees had consented to do, upon being indemnified

A bond, conditioned to repay to five persons all sums advanced by them or any of them, in their capacity of bankers, will not extend to sums advanced after the decease of one of the five by the four survivors, the four then acting as bankers.

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demnified against all loss, costs, charges, damages, and expences, by reason thereof; therefore, if the obligors, or any or either of them, should, at all times thereafter, upon request made, pay to the five obligees, their executors, administrators, or assigns, all such sum and sums of money, as at any time thereafter should be paid or advanced by the five obligees, or any of them, unto and for the use, or on the account of *Catterall* and *Watson* the younger, or which should or might become due or owing unto the five obligees by or from *Catterall* and *Watson* the younger, by reason of the nonpayment of the amount of any bills of exchange, promissory notes, or any other securities, which should thereafter be paid by *Catterall* and *Watson* the younger into the hands of, or be accepted by the five obligees, for or on the account of *Catterall* and *Watson* the younger, as their bankers, upon discount, or otherwise, or for interest, commission, postage, notarial, and other charges whatsoever; and also if the obligors, or either of them, should, at all times thereafter, effectually keep indemnified the five obligees, and each of them, their, and each of their heirs, &c. against all loss, costs, charges, damages, and expences whatsoever, which they, any, or either of them, should suffer, sustain, expend, or be put to, for or by reason of the non-payment of any such bills, promissory notes, or other securities, or for or by reason of any of their dealings or transactions as bankers for *Catterall* and *Watson* the younger, or in any wise relating thereto, or otherwise, not exceeding 3000*l.*, and costs, postage, commission, and interest, then the bond should be void. The Defendant pleaded, that after the making the bond, on the 23rd day of *July* 1807, *Wm. Golding* died, and that the obligors did, at all times after the making of the bond, upon request made, pay to the five obligees in the lifetime, and to the Plaintiffs since the death, of *W. Golding*, all such sums of money

as at any time after the making of the bond were paid or advanced by the five obligees, or any of them, in the lifetime of *Golding*, unto and for the use, and on the account of *Catterall* and *Watson* the younger, or which did become due and owing unto the five obligees, by or from *Catterall* and *Watson* the younger, by reason of the non-payment of the amount of any bills of exchange, promissory notes, or any other securities which were, after the making of the bond, paid by *Catterall* and *Watson* the younger into the hands of, or accepted by the five obligees, for or account of *Catterall* and *Watson* the younger, as their bankers, upon discount or otherwise, or for interest, commission, postage, notarial, and other charges, whatsoever; and also that the obligors did, at all times after the making of the bond, effectually keep indemnified the five obligees, and each of them, and the executors, &c. of *Golding*, against all loss, costs, charges, damages, and expences whatsoever, which the five obligees, or either of them, their, or either of their assigns, or the executors or administrators of *Golding*, or any of them, did suffer, sustain, expend or were put to, for or by reason of the non-payment of any such bills, promissory notes, or other securities, or for or by reason of any of their dealings or transactions as bankers for *Catterall* and *Watson* the younger, or in any wise relating thereto, or otherwise, not exceeding 3000*l.*, and costs, postage, commission, and interest, according to the tenor and effect of the condition. The Plaintiffs in their replication assigned their first and third breaches upon transactions stated to have taken place in the lifetime of *Golding*, upon both of which the Defendant took issue: and they assigned for the second breach, that after the making of the bond and the death of *Golding*, 3000*l.* became due from, and yet was in arrear and unpaid, by *Catterall* and *Watson* the younger, to the Plaintiffs, for and on account of divers sums of money, before that time,

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time, and after the making of the bond, lent and advanced by the Plaintiffs, after the death of *Golding*, unto, and for the use, and on the account of *Catterall* and *Watson* the younger, and also by reason of the non-payment of the amount of divers bills of exchange, promissory notes, and other securities, which, after the making of the bond, and death of *Golding*, were paid by *Catterall* and *Watson* the younger into the hands of, and accepted by the Plaintiffs, and also for interest, commission, postage, notarial, and other charges; and they assigned for a further breach of the condition, that after the making of the bond, and death of *Golding*, the Plaintiffs were put to great losses, costs, charges, damages, and expences, by reason and on account of the non-payment of divers such bills, promissory notes, and securities as aforesaid, which were respectively discounted, accepted, and became due and payable, after the death of *Golding*, and by reason or means of their transactions as bankers for *Catterall* and *Watson* the younger, and for costs, postage, commission, and interest, since the death of *Golding*, in the whole amounting to other 3000*l.*, which was still in arrear. The Defendant demurred to these breaches, and the Plaintiff joined in demurrer,

This case was argued in the last term. *Lens* Serjt. in support of the demurrer, contended, that by the tenor of this condition, the Defendant was liable only upon such transactions as had taken place during the life of *Golding*. This was the case of a surety, in which the strict terms of the contract were to be adhered to. The Court could not enter into inferences, and calculate for the obligee that if certain alterations in the terms of the contract, which appear to be but trifling, had been proposed to him before he had executed the bond, he would have acceded to them; the obligation he had entered into, was not to answer for such sums as might be advanced

by a banking house in which any of the obligees should continue partners, but for sums which might be advanced by any of the members of a banking house in which the obligor had the advantage of the joint discretion of all the five obligees to direct and moderate their advances; he was not bound to rely on the discretion with which the four survivors, when one of them was gone, might authorize advances to the principals. The words "or any of them," must be confined to mean one of them while all continued partners. This obligation would have been equally discharged, whether any new partners had been introduced, or whether any of the obligees had quitted the house. These principles were established and recognized by the several cases of *Lord Arlington v. Merricke*, 2 *Williams's Saund.* 4. *Ed.* 411. *b.*, and *Horton v. Day*, there, cited, *S. C.* *Sty.* 18. *All.* 10.; *Wright v. Russell*, 3 *Wils.* 530. *S. C.* 2. *Bl. Rep.* 934.; *Barker v. Parker*, 1 *T. R.* 237.; *Myers v. Edge*, 7 *T. R.* 254.; *Dance v. Girdler*, 1 *New Rep.* 34.; *Strange v. Lee*, 3 *East*, 484.; *Wardens of St. Saviour's v. Boslock*, 2 *New Rep.* 175. The only exception to the otherwise uniform train of authorities, is the case of *Barclay v. Lucas*, 1 *T. R.* 291. *n.*, and though *Buller J.* there dissented from the doctrine of this Court in *Wright v. Russell*, no other of the Judges questioned it: and the authority of *Barclay v. Lucas* has been much shaken by subsequent decisions, for though *Lord Ellenborough C. J.*, in *Strange v. Lee*, endeavoured to distinguish it, the difference was only in words, as *Mansfield C. J.* observed in *Dance v. Girdler*, so that this anomalous case must be considered as overruled.

Shepherd Serjt. contra. The Defendant is liable, within the true construction of this condition, for all money advanced by the banking-house of the Plaintiffs, whether before or after the death of *Golding*. The preamble

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preamble must be taken in aid of the condition, it recites an application to the obligees to supply money "in their capacity of bankers:" the duration of that capacity is not limited to the time of the death of the obligee first dying: the survivors still continue the trade, and the first branch of the condition is, to repay such sums as shall be advanced by the obligees or "any of them, as such bankers;" and the second branch is, to indemnify the obligees against all losses to be sustained "by them or either of them." And there is nothing to restrain the generality of these words to losses happening in consequence of transactions which might take place before the death of *Golding*. The cases of *Lord Arlington v. Merricke*, and *Day v. Horton*, are not applicable; for in each of them, upon the recital of the condition, it appeared that the offices were limited, that of *Jenkins*, in duration, to six months, and that of the bailiff, in local extent, to a certain hundred. In *St. Saviours v. Bostock*, though the bond did not recite the duration of the appointment wherein the good behaviour of the collector was warranted, it appeared on the plea, that it was annual: and therefore after the year was expired, the collector, whether re-appointed or not, was not acting under his old appointment; as to *Dance v. Girdler*, the society was gone before the money was received. In *Wright v. Ruffel*, it was mainly relied on, that a new partner had been taken into the house of the obligee, a feature which does not exist in this case; and in the case of *Barclay v. Lucas*, Lord Mansfield C. J. and Willes J. as well as Buller J. questioned that decision; in which, however, De Grey C. J. strongly dwelt on the circumstance, not found here, that the taking a new partner was the act of the obligee, whereas the death of *Golding* is the act of God. In *Myers v. Edge, Ainsworth*, one of the partners, voluntarily quitted the partnership; in *Strange v. Lee*, one partner died, a second, *Mac George*, quitted

quitted the partnership, and a third partner was admitted. In consequence of so many changes some difficulties might arise. If the retiring partners, *Ainsworth*, in the first of these cases, and *Mac George* in the latter, had formed a new partnership with strangers, and separately embarked in the same business with their old firm, it might be difficult to say that the surety should be liable, in the one case for goods furnished, and in the other for money advanced, by the new firms, as well as by the old firms; but these difficulties do not here occur: the decease of one partner only, though it makes an alteration in the persons who constitute the firm, makes no alteration at all in that, which was manifestly the intention of the parties, namely, that the house should still be the bankers of *Catterall* and *Watson*, and that the bond should secure any of the obligees who should act in that capacity. It is not necessary to contend that if any of the Plaintiffs had, in his distinct individual capacity, advanced money, which was not the money of the house, this bond would have secured it: they must advance it as bankers, but for all purposes of this bond the survivors are still the same house. Although this is the case of a surety, yet the principal is bound in the same bond, which must therefore receive the same construction in an action against the one, as in an action against the other; and it would be a greater hardship that the lender should fail to recover his debt from the principal, than that the surety should be holden liable for it.

Lees in reply. It is unnecessary now to enquire whether the bond can receive a different construction in the two cases. The Court is here to consider the case of the surety. Lord *Arlington v. Merrick* has always been esteemed a leading case on this subject, for the principles which it establishes, not merely as ruling that a guarantee

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guarantee for six months cannot be made answerable for twelve months. In *Myers v. Edge*, Lord Kenyon C. J. relied as well on the ground that the obligor might have placed great confidence in the discretion of *Ainsworth*, who had retired from the trade, as also on the ground that the Court could not make for the parties a different contract from that which they had themselves made. It is sought to substitute here a very different contract, namely, that the guaranty shall last as long as any one of the obligees shall continue to act as banker to the principals, whether strangers are to be joined to him as partners or not. And if all but one should die, how could he then make advances, otherwise than in his individual capacity, for which, it is admitted, the defendant would not be answerable, since the equitable share of his deceased partners would no longer be distinguishable from his particular money? *Dance v. Girdler* is a much stronger case than this: for there the obligor contemplated his becoming surety to a society not then incorporated, but intended so to be; for so we must infer from the condition for payment to the obligees and "their successors." The words "any of them," mean any of the five joint obligees, so long as the five shall continue to be the bankers of the principals; it is not any of the survivors of them; there is not in the whole condition a word that contemplates survivorship. Though it is not necessary that the hands of all shall concur in advancing the money, it is intended that the obligor shall have the benefit of the deliberation and discretion of all, and that when any one ceases to be partner, this obligation shall terminate.

Cur. adv. vult.

The judgment of the Court was on this day delivered by

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MANSFIELD C. J. The question here is, whether the original partnership being at an end, in consequence of the death of *Golding*, the bond is still in force as security to the surviving four; or whether that political personage, as it may be called, consisting of five, being dead, the bond is not at an end. The case has stood over in consequence of doubts which the Court entertained on particular expressions in the bond. Many cases were cited at the bar; and the result of them is, that generally when a change takes place in the number of persons to whom such a bond is given, the bond no longer exists. These decisions certainly fall hard on the obligees; for I believe the general understanding is, that these securities are given to the *banking house*, and not to the particular individuals who compose it; and we should readily so construe the bond if the words would permit. The words of the condition on which the question depends, (and which his Lordship now read over), again and again refer to the obligees' capacity of bankers; they were bankers, only as they were partners in their banking house, as it is called, and this security is conditioned to pay any money advanced by "them five or any or either of them." Taking those last words by themselves, it might at first be conceived that if any one of the five advanced money, this bond should secure it, but the words are afterwards explained, when it is seen that the money is to be paid to the five. Now it could never be intended that money advanced by one of them singly, should be repaid to the five; and this shews that the words "advanced by them or any or either of them," must be confined in their meaning to money advanced by any or either of them in their capacity of bankers, on behalf of all the five. This, then, being the construction of the instrument, from almost all the cases, in truth we may say, from all, (for though there is one adverse case of *Barclay v. Lucas*, the propriety of

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that decision has been very much questioned,) it results that where one of the obligees dies, the security is at an end. It is not necessary now to enter into the reasons of those decisions, but there may be very good reasons for such a construction: it is very probable that sureties may be induced to enter into such a security, by a confidence which they repose in the integrity, diligence, caution, and accuracy of one or two of the partners. In the nature of things there cannot be a partnership consisting of several persons, in which there are not some persons possessing these qualities in a greater degree than the rest; and it may be, that the partner dying, or going out, may be the very person on whom the sureties relied; it would therefore be very unreasonable to hold the surety to his contract, after such change. And though the sum here is limited, that circumstance does not alter the case; for although the amount of the indemnity is not indefinite, yet 3000*l.* is a large sum; and even if it were only 1000*l.*, the same ground in a degree holds, for there may be a great deal of difference in the measure of caution or discretion with which different persons would advance even a thousand pounds; some would permit one who was almost a beggar, to extend his credit to that sum; others would exercise a due degree of caution for the safety of the surety: and therefore we are of opinion, that as to such sums only, which were advanced before the decease of *Golding*, can an indemnity be recovered by the Plaintiffs; and as to the sums claimed for debts incurred since his decease, the judgment must be for the Defendant.

Judgment for the Defendant.

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GEORGE V. STANLEY.

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THE Defendant, a student at one of the universities, had fallen into the hands of a person, to whom he lost 300*l.* at hazard, and gave him bills for the amount. The bills were negotiated, and came into the hands of the Plaintiff; when they became due, the Defendant, being unable to discharge them, gave other bills in lieu thereof, and upon the last bills becoming due, he confessed a judgment, whereon execution being levied, *Vaughan* Serjt. had obtained a rule *nisi* to have the money restored, and the judgment and warrant of attorney set aside, and cancelled.

A young man gave bills for the amount of a gaming debt; and when they were due he renewed them with the then holder, and, for the last bills, when due, he confessed a judgment. The Court would not set aside the judgment, unless he could affect the holder of the bills with notice, but permitted him to try that fact in an issue.

Lens Serjt. now shewed cause. The Plaintiff was ignorant that the first bills were given for a gaming debt. The Court, therefore, will not set aside this judgment, and let in the Defendant to try the merits against a *bona fide* holder of the bills, unless on the terms of the Defendant's undertaking not to set up the statute of gaming as a defence, except that he can implicate the Plaintiff in a privity to the gaming transaction.

The Court held that the Defendant should have availed himself of this ground of defence, when he was applied to for payment of the first bills; but instead of then objecting, he gave others in lieu, and did not rely on the illegality of the original consideration, even when payment was asked of the last bills: but they permitted him to try in an issue, whether the Plaintiff were implicated.

Rule discharged.

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SNAITH v. BURRIDGE.

One of several partners in a contract with government cannot pledge goods consigned to him by another partner for the purpose of performing the contract.

The indorsing of the bill of lading by such consignor to the consignee does not constitute a lien in favour of the latter for his advances to the consignor.

THIS was an action of trover for a quantity of salt provisions. The cause was tried at *Guildhall*, at the sittings after *Michaelmas* term 1811, before *Mansfield* C. J., when it appeared that *Kieran, Stock, and Co.*, of *Dundalk*, in *Ireland*, *Græme* and *Metcalfe*, of *London*, and some other persons, the several houses not being in other respects partners, had jointly engaged in a contract to supply, at specified times, provisions for the navy: in what proportions or manner the several parties had agreed between themselves to furnish the goods, was not proved. In the course of the performance of this contract, and after several consignments had been delivered to government, *Kieran* and *Co.*, in *May* 1810, shipped a cargo of pork from *Ireland* to *Portsmouth*, and sent to *Græme* and *Metcalfe* a bill of lading, deliverable to the order of the shipper, and indorsed by *Kieran* in blank. There had been other transactions, independent of this contract, between *Græme* and *Metcalfe*, and *Kieran, Stock, and Co.*, upon the balance of which account *Kieran, Stock, and Co.* stood indebted to *Græme* and *Metcalfe* in more than 3000*l.*; the latter, without having any property of the former in their hands, were under acceptances for them to the amount of more than 10,000*l.* *Metcalfe*, (who, having become bankrupt, and obtained his certificate, was examined as a witness,) stated these acceptances to have been given "in anticipation of this and other bills of lading" of the shipments which *Kieran* was to make, and which were to be deposited in government stores: and the witness thought that his house being so much in advance for *Kieran*, was justified in raising money on that bill of lading. The Plaintiffs were the bankers of *Græme* and *Metcalfe*,

Metcalfe, but not of *Kieran* and Co., and were in advance to the former to the amount of 1800*l.* and more, as a security for which advances, *Græme* and *Metcalfe* had deposited with them two bills of exchange; and having occasion to raise more money for their general purposes, as the witness said, on the 4th of *June* they applied to *Watson*, one of the Plaintiffs, for a further advance upon a deposit of this bill of lading; which they had then received. *Watson* inquired "what prospect there was of disposing of the cargo, which was then still at sea, when it arrived;" *Metcalfe* said that the cargo was certainly intended by them to be delivered into the government stores, and that a victualling bill would be got, which would reimburse the Plaintiffs; he also told *Watson* it would be a convenience to them, if the Plaintiffs would give up the two bills of exchange, and let the 1800*l.* remain on the security of the bill of lading, which *Watson* agreed to do, and to make further advances to the amount of 4000*l.*; at the same time requesting *Metcalfe* to write a letter, therein stating that he deposited the bill of lading for that purpose. In pursuance of this request, on the 7th of *June*, he addressed to the Plaintiffs a letter, dated 4th *June* 1810, purporting to hand them a bill of lading for the provisions therein enumerated, shipped by *Kieran*, of *Dundalk*, on the *Eliza*, for *Portsmouth*, to be delivered there to his majesty's stores; and also a policy of insurance for 6000*l.*, effected on the said provisions, "both of which documents we hand you as security for any advances you may make on our account." (Signed) "*Græme* and *Metcalfe*." The Plaintiffs, upon receipt of this letter, and the bill of lading indorsed to themselves, gave *Græme* and *Metcalfe* credit for 4000*l.*, and delivered up to them the two bills of exchange; on the 11th of *June* *Græme* and *Metcalfe* stopped payment. Upon the arrival of the cargo at *Portsmouth*, the captain

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refused to deliver the goods to the Plaintiffs, and deposited them in a warehouse of the Defendant's, to be delivered only to his own order. *Mansfield C. J.* thought that this transaction was a pledging of the joint property of the partnership, made by one member of it, for their own particular account, with the knowledge of the pawnee that it was partnership property and that the proceeds were not to be applied for the purposes of the partnership; and directed a nonsuit, which *Shepherd Serjt.*, in the following term, obtained a *rule nisi* to set aside.

Lens and *Best* Serjts. in this term shewed cause. It appears upon the very terms of the letter which defines the security, that these were the goods of a partnership, or, which is still stronger, of *Kieran, Stock, and Co.* only, consigned to *Græme* and *Metcalfe*, for a specific purpose of the partnership, namely, to be delivered into the government stores, in performance of the joint contract, and that they have been diverted from that purpose of the partnership for the benefit of one party to it, *Græme* and *Metcalfe* only; for the "general purposes," of which *Metcalfe* spoke, and the words "our account" in the letter, did not mean the general purposes nor the account of the joint contractors, but the general purposes and the account of *Græme* and *Metcalfe*; and it was within the knowledge of the Plaintiffs, to whom the letter was addressed, that this was such a misapplication. This is yet more distinctly shewn by the circumstance, that the Plaintiffs, upon receiving the bill of lading, give up the bills of exchange which they before held, having held them not for the security of debts due from *Kieran, Stock, and Co.* jointly with the pawnors, but for the debt of the pawnors only. It might have altered the case, if it had been shewn that the credit thus obtained had been applied for the benefit of the joint contractors; but of that there was no evidence.

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The Plaintiffs knowing the circumstances of their own account with *Græme* and *Metcalf*, could not, therefore, but know, that this was a misapplication of the partnership property. And the rule of law is now too well established to be shaken, that a person cannot entitle himself to partnership property misapplied with his privity, by some of the partners, without consent of the others. Or it may be taken that each of the parties contributes certain articles towards supplying the contract with the government, and that until the goods are delivered into the king's stores, they remain the separate chattels of the party supplying them: but in that case, although *Kieran* and Co. were indebted to *Græme* and *Metcalf*, it does not therefore follow, that the latter were authorized to repay themselves that debt by pledging the goods of the former.

Shepherd and *Vaughan* Serjts., for the Plaintiffs, contended, first, that this was no misapplication of partnership property as between *Kieran* and Co. and *Græme* and *Metcalf*. Supposing that these goods were partnership property, the latter would have had a right to apply the proceeds thereof in discharge of the debt due to themselves from the former: they had, therefore, a right to accelerate these proceeds by transferring the bill of lading to the Plaintiffs. They did not thereby divert these goods from the purposes of the contract: the security to the Plaintiffs was consistent with those purposes; nay, the interest of the Plaintiffs required that the contract should be performed; the government stores were their best and readiest market for the goods; the bill of lading, signed by a joint contractor, would have been the warrant for the goods to be received, and the terms of the letter by which the goods were pledged, required that the pawncees should so deliver them; and upon their being delivered, the government would have given to the

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Plaintiffs the victualling bills for the price, which would have passed in their banking account to the credit of *Græme* and *Metcalfe*, and which, in *Græme* and *Metcalfe's* account with *Kieran*, would have gone to the credit of *Kieran*. But it has been admitted, and truly, that these were not, at the time of the pledging, partnership goods. *Kieran* being about to contribute his quota of goods to the joint contract, before he has thrown them into the common stock, applies, as must be inferred from the evidence, to *Græme* and *Metcalfe*, to make advances on the security of his shipments, and subject to their lien for their advances, the goods are to become partnership property. But they do not acquire that character till they are lodged in the government stores. That this was the course of dealing, was manifest from the circumstance of the bill of lading being indorsed by *Kieran* and sent to *Græme* and *Metcalfe* only: that act must have had some motive: one partner would not indorse over to another the bill of lading of a cargo, which was sent for the general purposes of the partnership; and as no other purpose appears, it must be presumed to be done in order to enable the consignees to raise money upon the cargo to cover their acceptances. At all events, *Kieran*, who gives to *Græme* and *Metcalfe* this ostensible legal sole title to the goods, cannot be heard to dispute a transfer, for a valuable consideration, made by means of the apparent title which he has himself furnished. There is no evidence that the money raised upon this pledge was not applied to the account of the joint contract. Secondly, it is not to be gathered from the evidence, that the Plaintiffs had any knowledge that there was any joint contract, or that this was the property of that partnership; but they considered it as the property of *Græme* and *Metcalfe* only.

Cur. adv. vult.

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MANSFIELD C. J. now delivered the opinion of the Court. After recapitulating the facts of the case, he observed, the Plaintiffs bring this action against the persons who obtained possession of the pork for the purpose of delivering it into the government store; and the question in the cause, is, whether *Græme* and *Metcalf* could pledge this bill of lading; and if they could not, whether the plaintiffs were not in the same circumstances as *Græme* and *Metcalf*: The bill of lading was in the common form, to deliver to the order of the shipper, on payment of freight. A letter from *Græme* and *Metcalf* to the Plaintiffs was produced, the tenor of which shews, that the pork was shipped to be delivered into the government stores; from the whole tenor of this letter, it follows, that the advances to be made on "our account" must be on the account of *Græme* and *Metcalf* only, not in any respect on the account of *Kieran*; and the writers mention this shipment as made by *Kieran* of *Dundalk*, as standing by himself, and quite independent of *Græme* and *Metcalf*. It was very important that this pork should be delivered according to its original destination, for if it were not, government would, of course, have an action against the persons who were to deliver it; it was clear, that it was intended by the shipper to be delivered into the government stores, and as he consigned it to *Græme* and *Metcalf* on those terms, it therefore must be taken to be accepted by them for that purpose; and if so, it could not be legally diverted to any other purpose. Then what is the situation of the Plaintiffs? they, knowing by the letter this fact, must stand in the same situation in which *Græme* and *Metcalf* stood. *Metcalf* spoke of being greatly in advance to *Kieran* and Co., and he said that he considered that his house was entitled to pledge the goods to cover those advances; now if *Græme* and *Metcalf* had delivered this into the government stores, they would
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immediately have received debentures, and might have been entitled to apply them in liquidation of those advances; but instead of doing that, they divert the goods to the Plaintiffs; which they were not authorized to do. The strongest case that can be put, is the case of a factor: for he has a general lien, yet he cannot pledge his consignments. Much stress was laid for the Plaintiff on the circumstance of the consignment being made to *Græme* and *Metcalf*, and it was argued that it therefore was not meant as a consignment to government, but the terms of the bill of lading are "paying freight;" now government would never have "paid the freight;" *Kieran* could therefore never consign directly to them: he must, for the purpose of having the freight paid, consign to some intermediate person, who would pay it: therefore no inference can be drawn from the bill of lading being indorsed to *Græme* and *Metcalf*. Upon these grounds we are of opinion that the

Rule must be discharged.

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If cause is shewn against a rule in the first instance, the counsel who obtains the rule has a reply in support of his rule.

BEST, Serjt. moved, that the prothonotary might review his taxation.

Vaughan Serjt. shewed cause in the first instance. *Best* would have supported his application. *Vaughan* objected to his being again heard.

Per Curiam. If cause is shewn in the first instance, the whole of that takes place on one day, which otherwise takes place on two. The one party moves for his rule in the ordinary way, the other party is heard to answer him on a subsequent day, and the first is again heard

heard in support of his rule. So is it here, the one moves for his rule, the other is heard in answer, and the first is to reply upon him.

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IN the year 1796, the Defendant then having privilege of parliament, was indebted to the Plaintiff in the sum of 600*l.* on bond: the Plaintiff at that time assured him, he would sue him the moment that privilege ceased. The Defendant shortly afterwards went abroad, and the Plaintiff now swore he believed that he went abroad in order to avoid this action, which was commenced by bailable process in 1807, and the Plaintiff then proceeded to outlawry against the Defendant. *Shepherd* Serjt. had in this term obtained a rule *nisi* that the outlawry might be reversed upon the Defendant's putting in special bail, or appearing in court to surrender his body to the custody of the Warden of the *Fleet*; he moved this upon an affidavit of the Defendant, that he was out of the realm before the outlawry, that he had been resident at *Vienna*, and that the moment he was first apprized that his personal appearance in *England* was necessary to the reversal of the outlawry, he had returned with all the expedition which the state of the continent would permit.

Error in fact, assigned to reverse an outlawry, that the Defendant was beyond seas, is not answered by shewing that he went beyond seas to avoid the Plaintiff's process

The Court will reverse an outlawry, for a common law error, on motion, upon the same terms to which the Defendant would have been entitled, if he had sued out his writ of error.

The bail to be put in by the Defendant upon reversing an outlawry, are bail in the original suit.

And their recognizance is in the alternative, to pay the condemnation money, or render the Defendant.

The Court agreed in this case, that where the Defendant was not of right entitled to the reversal of his outlawry, the Court would not grant it on motion, without engrafting such terms as appeared reasonable, the payment of the debt and costs; but where the Defendant was of right entitled to his reversal on error brought, the Court would relieve on motion, without imposing

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imposing any other terms, than, (if the process in the action were bailable,) the Defendant's putting in bail, or rendering himself in the discharge.

Vaughan Serjt. shewed cause against the reversal upon motion in this case, upon the ground that the Defendant had gone abroad purposely to avoid this action, and that although in the ordinary case, it was matter of error in fact, sufficient to reverse an outlawry, that the Defendant was 'beyond seas pending that proceeding, yet that cause of reversal was sufficiently answered by shewing that the Defendant had purposely absented himself from the realm. If the Defendant were put to his writ of error, the Plaintiff would have an opportunity to introduce this matter on the pleadings, and he had witnesses who could prove it, the Court would not therefore deprive him of this advantage, even if the matter of law were questionable; but he contended that this conclusion resulted from the authorities. *Co. Litt.* 259. b. "Albeit imprisonment be a good cause to reverse an outlawry, yet it must be by process of law *in invitum*, and not by consent or covin, for such imprisonment shall not avoid the outlawry, because, upon the matter, it is his own act." And the reason holds equally with regard to going beyond sea. *Matthews v. Erbo*, 1 *Lord Ray*. 349. The Court refused to reverse on motion an outlawry against an alien merchant living beyond sea, because by this means any person might contract debts, and then go beyond sea, and so he would be out of the reach of the law; but the Defendant might bring error. *Ashley v. Stockwell, Barnes*, 324., there the only difficulty which the Court felt in the case of a Defendant who had gone abroad for lawful purposes, but had staid abroad to avoid actions, was, to determine from what moment his staying abroad to defeat justice should be taken to commence. In the case of *Beau-*

champ v. Tomkins & another, ante, 3. 141., there was laches in the Plaintiff, and no contumacy in the Defendant. *Havelock v. Geddes*, 12 East, 622., the Court put the Defendant to his writ of error; and the conduct of the Defendant has in this case been so vexatious, that he is entitled to no favor: the Court ought therefore not to grant the rule, unless upon the terms that the bail to be put in, shall enter into a recognizance, not in the alternative form, to pay the debt or render the principal, as in the last cited case, but absolute, for payment of the condemnation money.

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Shepherd and *Onslow* Serjts. in support of the rule. This outlawry is sought to be reversed for an error at common law, not under the statute of 4 & 5 W. & M. c. 18. s. 3. or that of 31 Eliz. c. 3. It appears by the judgment of *Denison J.* in the case of *Serocold v. Hampsey*, 12 East, 626. n., that it has always been the practice of this Court before the statute of *William 3.*, that on reversal of the outlawry, and before the *superfedeas*, special bail in the ordinary way are required, to answer the condemnation money, or render the body. *Beauchamp v. Tomkins* was a case ofailable process, yet the Defendant was relieved upon entering a common appearance, because, after he had gone through the form of putting in his bail, they would have been entitled to relief on the same terms. The Court will in this case, as well as in that, grant the same thing at once on motion, which can be obtained through the circuitry of a writ of error.

The Court said that they had never heard that either the going abroad, or the staying abroad, with a view to avoid process, was a reason why the Defendant should not reverse an outlawry when he returned. No case had been cited in support of that proposition, which came

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came up to it; and the outlawry must therefore be reversed on payment of costs: what the costs were, the prothonotary would decide.

Rule absolute.

On this day the bail for the Defendant came to justify; when *Vaughan* said there was a difficulty in knowing to what process they became bail. No new original had been sued out since the reversal of the outlawry, and the old action, he conceived, was at an end. The usual course in the like cases had been, for the Defendant, upon reversal, to undertake to appear to a new original, in a new suit, for this he cited *Sercole v. Hanson*, 1 *Wils.* 3.

GIBBS J. In some cases where bail had not been required upon the original process, but the debt has been afterwards sworn to exceed 10*l.*, the Court have not reversed the outlawry on motion, unless on the terms of the Defendant putting in special bail; but in the case cited the bail are put in, not to a new original, but in the old action. The process of outlawry now used as a proceeding in the suit to bring in the party: the reversing it is merely the reversal of an interlocutory judgment.

The bail then entered into the usual recognizance in the action.

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SCHIMMEL v. LOUSADA.

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A VESSEL upon which an insurance had been effected, ran into *Cuba* in stress of weather, where the captain told her as incapable of repair, and discharged the crew. They and the captain all remained abroad. A total loss being claimed from the Defendants, and disputed, the Plaintiffs sent a person to *Cuba*, to induce the captain of the vessel, who was resident there, to come over to *England*, in order to give testimony upon the trial of this cause; and paid him a sum of money, and his expenses of the passage hither, of his subsistence during his stay here, and of his return. As soon as he arrived in *England*, which was in *Easter* term 1812, the Plaintiff commenced the present action, and it was prosecuted with diligence, and tried at the sittings after *Trinity* term 1812. Upon the taxation of costs, the prothonotary, finding that this witness was in *England* at the commencement of the action, thought himself bound to consider him in the usual case of any other witness resident in *England*, and refused to allow the costs of the captain's passage from *Cuba*, his subsistence here, his passage back, or the compensation made for his loss of time.

A plaintiff who brings over a foreign witness hither, in order to judge by his testimony whether there is ground to bring an action, and afterwards sues and examines the foreigner at the trial, may be allowed the costs of detaining him here from the time of the writ sued out until the trial, and a reasonable sum for his subsistence here during the same time; but not the costs of his passage hither, or of his return.

Shepherd Serjt. in this term moved that the prothonotary might review his taxation, upon the ground that under these circumstances the Plaintiff was entitled to have allowed him in his costs a reasonable sum for bringing over the captain of the vessel, keeping him here, and carrying him back, and a compensation to him for his loss of time: if this were not to be the practice, it would be impossible for merchants in case of foreign losses upon policies of insurance, to recover from the insurers,

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insurers, because the expence of bringing a witness from abroad would frequently be greater than the subscription of any one single Defendant on the policy. He suggested that in some late cases in the Court of King's Bench, similar allowances had been made.

The Court, after directing an enquiry to be made by the officer into the practice of the Court of King's Bench,

MANSFIELD C. J. said, It may be proper for the prothonotary to review his taxation, but we do not find that it is in the practice of the Court of King's Bench to make any allowance of expences incurred by a witness before the commencement of the action. We are therefore of opinion that nothing ought to be allowed in the present case for the subsistence or passage hither of the witness, incurred before the commencement of the action; but it may be reasonable for the Court to allow something for the expence of his subsistence here pending the action. It seems reasonable that the witness being here before the expence of an action was incurred, and brought hither probably for the purpose of judging whether it would be advisable to bring the action, we should allow him thus much, but inasmuch as we do not allow any thing for his coming here, neither ought we to allow for his return.

Leas Serjt. was instructed to shew cause against this application in the first instance; but as the Court had expressed their opinion, he declined to argue the point. (a)
 Rule absolute.

(a) See the next case.

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STURDY v. ANDREWS.

Nov. 28.

THIS was an action upon a policy of insurance. The Plaintiff being under the necessity of procuring some witnesses who could speak to the circumstances of the voyage, and having on the 28th of *October* 1811 found in *London Christian Volta, John Volta*, and another foreign seaman, who had navigated the vessel during the adventure insured, and were then about to depart to their own country, inasmuch as no others of the crew were then in *England*, he detained here these men at his expence, from that time until the 23d of the month of *December* following, when they were examined upon the trial of the cause at the sittings after *Michaelmas* term, and upon their testimony the Plaintiff obtained a verdict. The Plaintiff sued out his writ on the 29th of *October*: he had not applied to the Defendant for his consent that these witnesses might be examined on interrogatories and suffered to depart. Upon the taxation of the costs for the Plaintiff, the prothonotary thought he was not warranted to allow the costs of detaining these persons.

The court will allow the costs of detaining a foreigner here to give evidence upon a trial, computed from the day of the writ sued out to the day of trial.

The practice of the Court of King's Bench is the same.

Shepherd Serjt. on a former day in this term obtained a rule *nisi* that the prothonotary might review his taxation and allow the costs of the detention of these witnesses from the 30th of *October* to the 23d of *December*. He moved this upon an affidavit of the Plaintiff, that the persons were necessarily detained from the 28th of *October* to the 23d of *December* for the purpose of giving evidence in this cause, and on no other account whatever, and that if they had not been so detained, it would have been necessary to find and bring over hither from the continent the captain, or some other person

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belonging to the ship, in order to prove the facts; that it would have been very difficult to find such person, and would have been attended with still greater difficulty and much more expence to have induced him to come over hither for the purposes of this cause; and that the expences of bringing him over, maintaining him here, and sending him back, would have been much greater than the whole damages to be recovered in the cause, the Defendant being the only underwriter on the policy who still continued solvent. He said he was in possession of several instances in the Court of King's Bench where the master had allowed the expence of detaining witnesses in this country from the day of the writ issued to the day of trial. In one case, so large a sum as 700*l.* had been allowed for the costs of bringing one witness from abroad, and it was conducive to the saving of expence to Defendants to allow the costs of detaining a witness when he was in this country, that the charge of bringing him over again might not be incurred.

Best Serjt. on this day shewed cause, on the ground that the Plaintiff sought to burthen the Defendant with an expence that might have been avoided; for that, probably, if the Plaintiff had proposed it, the Defendant would have consented that these witnesses should have been examined on interrogatories, and have proceeded on their homeward voyage. It would also lead to frauds upon suitors if this head of costs was to be admitted.

Shepherd, in support of this rule. It might often be very disadvantageous to the case of a Plaintiff, to ask the Defendant's consent to an examination upon interrogatories; and the Defendant does not now swear, that if it had been asked he would have consented. The
protho-

prothonotary will in each case examine whether the detention has been necessary for giving evidence in the cause, or is made for vexatious or fraudulent purposes.

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MANSFIELD C. J. In this case there is no suggestion of any management on the part of the Plaintiff, and it is not sworn that the Defendant, if applied to for his consent to an examination upon interrogatories, would have consented. The prothonotary did extremely right in not allowing these costs in the first instance, because they are not within the ordinary rule of costs; but, under the circumstances, it is highly reasonable that the costs of detaining these witnesses here should be allowed.

GIBBS J. If the Plaintiff had waited till after the action had been commenced, and had then brought over the captain, he would, according to the principle established in the case of *Schimmel v. Loufada*, (a) have been entitled to the expences of bringing him over, supporting him here, and of his return. For there the case was, that the witness had been brought over before the action commenced, and detained here during the action; and the Court held, that as he was brought over before the action commenced, they could not allow the costs of his coming over, nor, for the same reason, the costs of his return, but they allowed the costs of detaining him pending the action, until the trial. In this case the Plaintiff avoids incurring the costs of the witnesses's coming over hither, and of his return, by retaining the witnesses here. In fact, therefore, this is in favour of the Defendant; for if, instead of detaining them here, he had let them go, the Defendant would have been subject to the expences of bringing them

(a) See the preceding case.

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over, maintaining them here, and of their return. Therefore the costs of detaining them here ought to be allowed,

Rule absolute.

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POOL v. COURT.

The Defendant's tenancy of land in F. at a certain rent was alleged as the consideration for his promise to manage it in a husbandlike manner. The land for which the rent was reserved was in F. and C. This was held to be a fatal variance in stating the consideration of the promise.

ASSUMPSIT. The Plaintiff declared that the Defendant had become tenant to him of divers, to wit, 16 acres of land situate in the parish of *Fiddington*, in the county of *Somerset*, at a certain rent therefore payable, and that in consideration of the premises, the Defendant undertook to manage the land in an husbandlike manner; and the Plaintiff alleged a breach by improperly cutting the hedges. Upon the trial of the cause, at the *Taunton* Spring Assizes, 1812, before *Graham* B. it was proved that the Defendant was tenant to the Plaintiff of the 16 acres, at a certain yearly rent, and that the breach was committed upon land in the parish of *Fiddington*: it appeared, however, that one close of the land demised was not in the parish of *Fiddington*, but in the adjoining parish of *Chaddington*; and it was objected for the Defendant that therefore the consideration of the contract was improperly stated on the declaration. *Graham* B. overruled the objection, and the jury found a verdict for the Plaintiff with 40s. damages.

Shepherd and *Pell* Serjts. had in the last *Easter* term obtained a rule *nisi* to set aside the verdict, and enter a nonsuit, upon the same objection; against which rule

Lees Serjt. in *Trinity* term, shewed cause. The land to which the injury was proved to be done was in the parish

parish of *Fiddington*, and all the allegations respecting the land in *Fiddington* are true. Enough is proved to introduce the general obligation upon the tenant to manage land in an husbandlike manner. *Clarke v. Gray*, 6 *East*, 564. it was held unnecessary to state the special exception in a contract where it did not affect the case.

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Shepherd, contra. The lands which the Defendant held at a certain rent were lands in the parishes of *Fiddington* and *Chiddington*. All the rent reserved did not issue out of lands in the parish of *Fiddington*. The Plaintiff could not have avowed in replevin on a demise of land in that parish. The allegation of the parish in which the land is, cannot be rejected as surplusage. The consideration for the promise declared on is the contract, which must therefore be alleged such as it exists; but there was no contract for the demise of land in *Fiddington* at a certain rent.

Cur. adv. vult.

MANSFIELD C. J. now delivered the opinion of the court. Since the declaration states that all the land lay in the parish of *Fiddington*, and that the land lying in the parish of *Fiddington* was let at a certain rent, the declaration is not good, for the land in the parish of *Fiddington* was not let at the certain rent therein mentioned, therefore the objection must prevail.

Rule absolute.

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COPLEY v. DAY.

If the Plaintiff dies after verdict for the Defendant, and the Defendant does not enter up judgment within two terms after the verdict, the Court have no authority to permit it to be entered up afterwards, *nunc pro nunc*.

THIS was an action of covenant for not performing repairs. Upon the trial at the York Spring assizes 1810 the cause was referred to a gentleman of the bar, who was to direct for whom the verdict should be, and the costs were to abide the event of the award. On the 18th of April 1810 the arbitrator awarded that nothing was due from the Defendant to the Plaintiff, and that the former was entitled to the verdict. On the 6th of May 1810 the Plaintiff died, having previously by his will appointed executors, who took out probate. On the 3d of November 1810 the Plaintiff's attorney died, and the Defendant had taken no step since the award made.

Shepherd Serjt. on the first day of this term obtained a rule *nisi* that the Defendant might now be at liberty to sign final judgment against the deceased Plaintiff, as of *Easter* term 1810, and that the costs might be taxed for the Defendant, he docketing the judgment of the present term, that it might not disturb any other judgments which since his verdict might have been obtained against the executors or the deceased: he said he added this restriction, because it was laid down in *Tidd's Practice*, 2 *Ed.* 854., who cites a case of *Baker v. Baker, Executrix, Hil. T.* 35 *G.* 3., that where the court gives leave to enter up judgment as of a preceding term, they will add this restriction.

Vaughan Serjt. on a subsequent day shewed cause. The *stat.* 17. *Car.* 2. *c.* 8. *f.* 1. does not enable the Defendant to enter up this judgment; for that statute only enacts that in all actions, the death of either party between

tween verdict and judgment, shall not thereafter be alleged for error, so as such judgment be entered within two terms after such verdict. *Hely v. Baker, Siderf.* 385., it was held, indeed, that signing judgment within two terms was entering a judgment for the purposes of that act; but no construction will extend to this indulgence. It was refused in the case of *Flower v. Lord Bolingbroke*, 1 Str. 639. [Heath J. The reason why the Court would not grant it in that case seems to have been that the Plaintiff wanted to get a preference over other creditors, but the Defendant here does not seek to have that preference.] *Fowler v. Whadcock. Barnes*, 262. the like application was dismissed.

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Shepherd contra.

THE COURT observed that this was clearly not a case within the statute, but was an application to be permitted at common law to enter the judgment as of the term in which the award was made. If it should be once put on the record, against which there could be no averment, although it were actually in time much posterior, it would refer to the 9th of May 1810, the first day in bank of that *Easter* term; and if it could be done, they were well disposed to grant the application, the Defendant undertaking not to disturb any judgments that had been entered up in the mean time against the executors, or payments that had been made by them. But they doubted, inasmuch as by the common law the death of either party between verdict and judgment was matter of error, and as by the statute it only ceased to be error in the special case of judgment being entered up within two terms after the verdict, whether the court had any power to grant an indulgence which neither the common law nor the statute had given, and they desired *Shepherd*, if he could find any

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precedent, to mention it at a future day, who on this day said he had found none, and that upon looking into the cases, he believed the thing could not be done; wherefore the Court

Discharged the Rule with Costs.

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ROUTLEDGE v. THORNTON.

The appointment of an umpire made in writing by two arbitrators requires no stamp.

ONE amongst other objections, upon which *Vaughan* Serjt. had obtained a rule *nisi* to set aside the award of an umpire, was, that the arbitrators, in exercising the power given them to appoint an umpire, had made their appointment in writing upon paper not stamped. *Onslow* Serjt. shewed for cause, that no statute required a stamp for the appointment of an umpire.

The Court being of that opinion, the

Rule was discharged.

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HORNE, suing by the Name of HALL, v. CARR.

It is not sufficient for bail to swear they are worth a certain sum exclusive of their debts.

THE bail in this cause, justifying by affidavit, swore, that "they were worth 30*l.* exclusive of all their debts;" *Clayton* Serjt. objected, that these words did not sufficiently denote that they were worth 30*l.* after payment of all their just debts. The more obvious meaning of the words was, that, laying all their debts out of the question, they were worth 30*l.*

Best Serjt. contended that the practice of the Court did not require that the bail should swear in any particular

cular form of words to denote the sufficiency of his property, and that the meaning of this expression was sufficiently clear, to enable the Plaintiff to support an indictment for perjury, if the bail was not worth 30*l.* after payment of all his debts.

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But *The Court* held, that the more obvious meaning of the words was that which *Clayton* assigned to them, and rejected the bail.

FRY and Another v. MALCOLM.

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THE Plaintiff in this case, after having had the costs of a former action taxed for him, under a rule of this court, had commenced an action upon the allowance, and holden the Defendant to bail for the amount of 15*l.* 1*s.* 4*d.*: *Best* Serjt. had in the last term obtained a rule nisi, that the bail-bond might be delivered up to be cancelled, upon the defendant's entering a common appearance, contending that no such action would lie.

The Court will not permit a Defendant to be holden to bail in an action founded on the prothonotary's *allocatur* for costs.

And *semble*, that no action will lie for costs.

Shepherd Serjt. in this term shewed cause. These costs were so much a civil debt, that a man can be no otherwise treated in arresting him upon an attachment for them, than in an arresting him for any other debt. This debt might be recovered under a commission of bankruptcy. If two persons submit to an award, and agree it shall be made a rule of Court, an action, as well as an attachment, will lie on the award. When the Court makes an order which is within their jurisdiction, for payment of money from *A.* to *B.*, thereupon arises a legal and moral obligation upon the party to pay. Upon that obligation therefore an action will lie. All goes to shew that this is no more than a civil debt, and if it be a civil debt,

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debt, the Plaintiff has a right to all the remedies which are given for a civil debt. The only reported case of an action upon an order of a court, is that of *Rann v. Green*, Cowp. 474., which was brought on an order made under an act of parliament by the Lord Chancellor and two Chief Justices, and the Court there held that the action well lay.

Best Serjt., in support of his rule, said the case of *Rann v. Green* was utterly unlike this. Lord *Mansfield* there expressly says, the statute is the only ground of action. It is like the case of a judgment: the three are as much made judges by that statute as the Court are judges here. But, as *Eyre* C. J. says, *Emerson v. Lashley*, 2 H. Bl. 251., the obligation in this case arises out of the power of the Court. There were awards before the stat. of *William*, upon which actions could be brought, but that statute does not, although it gives a new remedy, take away the common law remedy. This present case stands upon this simple principle: here is a duty founded on the practice of the Court, and the only mode of recovery is given by the same practice, viz. by attachment. The point was not even disputable; and where it was clear that the action would not lie, the Court would not permit the Defendant to be holden to bail.

MANSFIELD C. J. The question on this rule is not clearly and simply that which has been argued, whether an action can be maintained on an order for payment of costs, but the question is, whether the Defendant shall be holden to bail on such an order. That position we may grant, without deciding the other; to the intent that if the party be not satisfied with the opinion of this Court, that the action will not lie, he may take the opinion of another Court in error. I never heard of such an action, and the temptation to it arises every day;
and

and according to the case cited, of *Emerson v. Lasbley*, it is not actionable; and it would be of mischievous effect if it were; for there would be too many such actions. The Plaintiff may proceed with his action, if he thinks it worth while.

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HEATH J. Such an attempt deserves no favour.

CHAMBERE J. It is a most mischievous proceeding.

GIBBS J. It is clear the Court will not discuss, in a motion to set aside a bail-bond, the question whether the action will lie; but if there be a rule of Court that for any particular cause of action there shall be no arrest, the Court will, nevertheless, discharge the Defendant. If the Defendant thinks no action can be maintained, let him demur to the declaration. The case of *Smith v. Whalley*, 2 Bos. & Pull. 484., has an aspect that way, where the Court say, that the general rule is clear, that the mere order of another Court is not a good ground of action. I think it clear the action will not lie. But at all events the Plaintiff ought not to have arrested the Defendant: there are many cases in which the Courts have not permitted an arrest, although there may have been a debt above 10*l.*, as where the original demand was below 10*l.*, but swelled up to it by costs.

Rule absolute with Costs, the Defendant undertaking not to bring any Action for false Imprisonment.

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GILL, Plaintiff; YEATES and Wife and Others,
Deforciant.

Where a deed, leading the uses of a fine, no otherwise ascertained part of the premises omitted in the fine than by referring to a devise, which referred to a deed of partnership, which contained a covenant to purchase lands, which covenant had been performed, and lands had been purchased, the fine was permitted to be amended by the insertion of the lands so purchased thereunder.

Fine amended by insertion of newly-erected works and buildings.

Fine amended in clerical misprisions, which made it infensible.

A writ of covenant cannot be transferred from one county to another, nor can parishes comprised in wrong counties be transferred to the right counties.

But additional parishes in the same county may be inserted, where, it is seen by a clear relation, that land in those parishes was intended to pass.

IN *Michaelmas* term, 6 *Geo.* 3. a double fine, *i. e.* with several writs of covenant in the two several counties, but with one *licentia concordandi*, one concord, note, and cyrograph, (which is good, 2 *Sellon Pr.* 479. 2 *West. Symb. Fine.* 8. 10. *b. Dy.* 227. *pl.* 44.) was levied between the above parties of the "two-and-thirtieth part or share of the navigation of the river *Avon*, from the city of *Bath* to *Hanham's* mills or weir, not exceeding the said *Hanham's* mills or weir, one hundred and fifty yards, together with all tolls, rates, and duties for the carriage of passengers and goods upon the same, and of three acres of land with the appurtenances in the parishes of *Wesson*, *Kelston*, *Keynsbam*, and *Hanham's* in the county of *Somerset*, and of the two-and-thirtieth part or share of the navigation of the river *Avon*, from the city of *Bath* to *Hanham's* mills or weir, not exceeding the said *Hanham's* mill or weir one hundred and fifty yards, together with all tolls, rates, and duties, for the carriage of passengers and goods upon the same, and of three acres of land with the appurtenances in the parishes of *Bitton* and *Salford* in the county of *Glocester*." In the deed to lead the uses of this fine, 1st *November* 1765, *T. Yeates* and wife and others, described to be the devisees under the will of *John Stagg*, conveyed to *Gill* an undivided two-and-thirtieth part or share of and in the river *Avon*, from the city of *Bath* down into and within the mill-pool or weir-pool below *Hanham's* mill and weir, not exceeding one hundred and fifty yards, made navigable, useful, and

passable

passable, for boats, lighters, and other vessels, in pursuance of the act (10 *Ann* c. 8. therein named); and of and in all lands, tenements, and hereditaments, purchased by, and conveyed to the use of the copartners and undertakers, mentioned in a certain indenture of the 11th *March* 1794, (of whom *John Stagg* was one,) their heirs and assigns, and of and in all dividends, profits, privileges, and advantages to the said undivided thirty-second part, belonging or appertaining, and all the estate, &c. of the consors of and in the premises by virtue of the said act, indenture of copartnership, and will of *John Stagg*, or otherwise. The act 10 *Ann* c. 8. (local and personal,) entitled an act for making the river *Avon*, in the counties of *Somerset* and *Glocester*, navigable, from the city of *Bath* to or near *Hanham's* mills, reciting that the clearing a passage for boats upon the river *Avon* from *Bath*, in the county of *Somerset*, to *Bristol*, in the counties of *Somerset* and *Glocester*, would be beneficial to trade, empowered the mayor, aldermen, and common council of the city of *Bath*, their successors and assigns, and such persons as they should nominate and appoint, their deputies, &c., at their proper costs to make the river *Avon* from the city of *Bath*, down into and within the mill-pool or weir-pool below *Hanham's* mills and weir, not exceeding 150 yards, navigable, &c., and to use such navigation by and through such passages and watercourses into the said river as they should think fit, and to set out and appoint towing-paths for men for haling of boats, &c. making satisfaction as therein mentioned, and upon payment, to remove, dig, and use so much of the land, and erect works for the effecting and maintaining the navigation as they should think requisite. In the prosecution of the purposes of the act, several parcels of land had been, before passing this fine, or the devise by *John Stagg* after mentioned, purchased by the proprietors of the navigation for making locks, cuts, and wharfs, and

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and they had paid a satisfaction to certain land owners for the damage done to the land in making and establishing thereon public towing-paths in certain of the parishes through which the river passed, among which were the parishes of *St. James*, in the city of *Bath*, and *Salford*, in the county of *Somerset*: some additional buildings and works, not mentioned in the fine, had also been erected and made since the purchases, but before the fine. It had been now objected to the title by a purchaser, that the description of the navigation in the fine was not agreeable to the description in the act, and was in part insensible; that the purchased lands in the parish of *St. James, Bath*, (which was not mentioned at all,) and in that of *Salford*, in the county of *Somerset*, (which was falsely described as in *Glocestershire*,) did not pass by the fine; that the lands in *Hannam* did not pass, because there was no such parish as *Hanham's* in the county of *Somerset*, *Hannam* being in the county of *Glocester*, and being a hamlet within the parish of *Bitton*; that the new erections, buildings purchased, and towing-paths, ought to have been specified in the fine, and that the number of acres of land in *Somerset* comprised in the fine was less than the whole that had been purchased before the fine, which, therefore, was insufficient to comprehend it. *Pell* Serjt. in *Easter* term 1812, moved to amend the fine, 1. by making such insertions, and omissions of words as were necessary to render the insensible description of the navigation correct, and conformable to the description in the deed; 2. by inserting the parish of *St. James* in the city of *Bath*; 3. by transposing the parish of *Hanham's* from the county of *Somerset* to the county of *Glocester*; 4. by transposing the parish of *Salford* from the county of *Glocester* to the county of *Somerset*; 5. by inserting the purchased and newly-erected buildings; 6. by substituting six acres of land for three; and, 7. by adding common of pasture (which had been antiently appurtenant

nant to the land purchased, before it was converted to locks, wharfs, and watercourses). He conceived this amendment was warranted by the above statement of the deed to lead the uses, and by an affidavit, which stated that the navigation in question had been made under the recited act; that in fines levied of other shares in the same property the premises were described in terms similar to those now sought to be obtained; that the lands omitted had formerly been purchased and paid for by the proprietors; that the local situation of the several premises was such as above mentioned; that the proprietors of the tolls were entitled to the premises sought to be inserted, and in possession of them so far as their public nature permitted them to be the subjects of possession; that the present vendor believed all the premises had been intended to pass by the fine, and he had been in possession 20 years and upwards. *Pell* urged that the Court would have no difficulty in transposing the parishes to their proper counties. The deed to lead the uses; he observed, mentioned neither county nor parish for any parts of the premises, but this was a double fine levied in both counties. The length of time which the vendor had already possessed the property was a bar to a *formedon* or ejectment, and the amendment was only asked *ex majori cautela*.

HEATH J. With respect to transposing the parishes from one county to another, I never remember an amendment of this sort. A writ of covenant is a real action, and is local. If a person brings a real action in one county, how can the Court amend it by making it to be an action in another county (*a*). With respect to the amendments prayed, we cannot help such extreme negligence as this; we may help lesser matters: if parties will employ an ignorant man to do their business, it cannot be helped.

(a) And see *Anonymous*, ante, iii. 418. acc.

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The Court rejected the application.

The reporter seeing upon examination of the title, that the land in *Hanham* in *Glocestershire* well passed as comprized in the parish of *Bitton* in that county, *Stork v. Fox, Cro. Jac.* 120. *Waldron v. Muscarit. 1 Vent.* 170. and that the enumeration of the parishes of *Salford* in *Glocestershire*, and of *Hanham's* in *Somersetshire*, neither of which had existence, was mere surplusage, which did not vitiate, and that the common of pasture was obsolete and immaterial; and the purchasers consenting to take their chance, upon the construction of the insensible description of the river in *Glocestershire*, directed a fresh application to be made, restricting it to such amendments as appeared to be warranted by the muniments stated below. Accordingly in this term, *Lens* Scrjt. moved to amend that branch of the fine only which related to the premises in the county of *Somerset*, 1. by making the description of the navigation in that county sensible, in conformity to the deed of uses, and on the authority of *Cooke* Plaintiff, *Milles* Deforciant, *ante*, iv. 644.; 2. by inserting the parishes of *St. James, Bath*, and *Salford*, in the county of *Somerset*, and, 3. the purchased and late erected buildings and works under the description of five messuages, five mills, five warehouses, five stables, five quays, five wharfs, five tofts, five gardens, and five ways, (of which last, a fine lies, 2 *Ed. 3. fo. 19. cit. West. Symb. Fines*, f. 265. *acc. de passagio, ibid.*) and, 4. by substituting "six" for "three" acres of land upon the principles frequently admitted by the Court, as instanced in the cases of —, *Demandant, Shaw, Tenant, Hawkins, Vouchee, ante*, iii. 74. *Home, Demandant*; —, *Tenant; Rossiter, Vouchee; ante*, iv. 366. *Strong, Demandant; Still, Tenant; Drake, Vouchee; ante*, iv. 155. *Rosse, Demandant; Lacon, Tenant; Anguiss, Vouchee; post*, v. 2. and *Lambe, Plaintiff; Reason, Deforciant; post*, v. 207. The facts which

were

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were relied on to warrant the amendment were as follows: the deed to lead the uses did not in the parcels enumerate any county or parishes, nor any quantity of land, but it purported to pass all the premises that were devised by the will of *John Stagg*, and all the lands purchased for the use of the undertaking, and all the rights given by the act of Parliament. The will of *John Stagg* did not specify the quantity of land, or the parishes; but he devised to the Deforceants, and the heirs of certain of them, "all his share and interest in the copartnership or undertaking, for making the river *Avon* navigable from *Hanham* mills to the city of *Bath*." What that share was, appeared by an indenture of 32 parts of the 11th day of *March* 1724, by which, after reciting that the act of 10 *Ann. c. 8.* empowered the mayor and corporation of *Bath*, their nominees, and assigns, to make the river navigable, and reciting that by indenture of the 10th of *March* 1724, the mayor and corporation had assigned that power to 32 persons, of whom *John Stagg* was one, the said *John Stagg* and the other 31 persons mutually covenanted to become copartners in the making of the river navigable, and also in the purchasing such tracts of land adjoining to the river, as were needful to be cut into watercourses and locks, for haling paths, and other necessary ways. An affidavit now produced stated conveyances made to the undertakers in 1725, of certain pieces of meadow land in *Salford Common Mead*, in the parish of *Salford*, in the county of *Somerset*, and certain land taken out of a meadow called the *Amery*, lying next to the river *Avon*, in the city of *Bath*, &c.; and another indenture of 18th *December* 1730, between the same parties as the last-mentioned deed, after a recital whereof, and that a wharf and warehouse had then been built on the premises, the conveying parties covenanted with the purchasers to levy a fine of the same premises

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by the same description, and to the uses, of the foregoing deed; and in *Michaelmas* term 4 G. 2. a fine was in pursuance thereof levied of the same premises by the description of one warehouse and one wharf, with the appurtenances, within the parish of *St. James*, in the city of *Bath*. The vendor's affidavits stated the contents of these several documents, and that the omitted lands were in the respective counties and in the respective parishes sought to be inserted; that the additional buildings had been erected before the date of the fine and of the will of *John Stagg*, according to his information and belief, and were then in the occupation of the proprietors of the 32 shares in the tolls and undertaking, and that payment had been anciently made by the undertakers, as was witnessed by certain deeds poll, of sums in compensation for the injury which the owners of certain lands in some of the parishes, wherein they did not purchase any estate, permanently sustained by the public easement and towing-paths thereon, set out and made by the undertakers under the powers of the act, for the subjects navigating the river; that the vendor had been 20 years in enjoyment of his share, and that he believed all the premises were intended to pass, but had been omitted through neglect, and that all the cosutors were dead, so that no new fine could be levied. *Lens* compared this to the case of fines of shares in the *New River Company*, wherein omissions of very numerous parishes had often been amended.

~ The Court, upon these affidavits, and inspection of the deed to lead the uses, and an office copy of the devise by *John Stagg*, without difficulty permitted the amendment.

CASES

ARGUED AND DETERMINED

1813.

IN THE

Courts of COMMON-PLEAS,

AND

EXCHEQUER-CHAMBER,

IN

Hilary Term,

In the Fifty-third Year of the Reign of GEORGE III.

COLLETT V. BLAND, WILSON, and FISHER.

Jan. 23.

THE Plaintiff sued out a *capias* against *Wilson* returnable on the effoin day of *Trinity* term, 10th *June* 1811. The Defendants *Wilson*, *Bland*, and *Fisher*, entered into a bail-bond. The Plaintiff never declared, nor obtained any rule for time to declare in the original action, but took an assignment of the bail-bond, and sued out a writ thereon against the bail and principal, tested the 11th of *May* in *Easter* term 1812, and returnable on the morrow of the *Holy Trinity*, which was served on the 23d of *May*.

The Plaintiff may proceed against the bail although the original action is out of court, it not appearing when the bail-bond was assigned.

Lens Serjt. had obtained a rule *nisi* to set aside the proceedings in this action, upon the ground that the

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original action being out of court for want of a declaration, the Plaintiff could not afterwards proceed on the bail-bond, for which he cited *Piggott v. Truste*, 3 Bos. & Pull. 221. and *Sparrow v. Neyler*, 2 Bl. 876.

Onflow Serjt. now shewed cause against the rule. If the Plaintiff were to proceed in the original action after taking an assignment of the bail-bond, he would thereby wave the assignment.

Lens, in support of his rule, observed, that it did not appear in this case whether the original action was out of court before the plaintiff took the assignment of the bail-bond, or not: if it was then out of court, all the subsequent proceedings would have been irregular, according to *Sparrow v. Neyler*, if it was not, still the Plaintiff's laches was, according to *Piggott v. Truste*, a good ground for an application to the equitable jurisdiction of the court for relief, and as the Plaintiff in whose knowledge the fact lay, had not shewn by his affidavit that the assignment was taken before the original action was out of Court, it must be presumed most strongly against him.

The Court held that the circumstance, that the original action was out of court, would not aid the Defendants. The counsel for the Defendants did not explain how it was either usual or prudent to proceed in the original action after proceeding against the bail. It did not appear to the court how any thing that took place in the original cause after the action against the bail was commenced could be material thereto, and they

Discharged the rule.

The officers agreed it never was usual in such case to proceed in the original action.

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SIFKIN v. GLOVER.

Jan. 23.

THIS was an action upon a policy at and from *London* to *Archangel*, and back again to *London*. The vessel failed under a licence from the king in council, to trade in grain, and certain other specified articles, which was to continue in force till the 29th of *September* 1810: an order in council extended the time of all licences which were to expire on that day, to the 1st of *January* 1811. The ship proceeded on her voyage, and arrived at *Archangel* on the 26th of *August* 1810, and her cargo was confiscated by the *Russian* government, that occasioned delay: on the 18th of *September* 1810, the captain received permission to ship a cargo for a neutral port; she could not however complete her loading till the 16th of *October*: that cargo was pitch, tar, and mats. The ship failed on her homeward voyage, but was obliged to put back and winter, being impeded by floating ice, and having been stranded, she was obliged to unload for the purpose of repairs, and the mats, which were not taken on board for dunnage, but constituted a considerable part of her cargo, were destroyed by fire: the ship was reloaded with wheat, having lain in that place long enough to correspond with *England*, and receive directions so to do, and to proceed to *Leith* for orders. The owners in *England* obtained another licence for the *Anna Maria* to return from *Archangel* to *Leith* with a cargo of grain, &c., which licence not being with the ship, her clearance with the cargo of wheat could not be indorsed on it at the time of her obtaining it. *Shepherd* Serjt., for the Defendants, contended the adventure was not sufficiently protected by the first licence, because it required the clearance to be indorsed; and the clearance of the substituted cargo was not indorsed; secondly, because that licence was

A licence to trade, which is to expire on a certain day, will protect the adventure beyond that day, if it be protracted by events which the licensed party cannot control.

And where a homeward cargo, shipped without laches after the licence expired, was, through perils of the sea, necessarily unladen in the course of the voyage, and destroyed by fire on shore, held that the licence protected a cargo of the specified goods, substituted for the cargo, burnt.

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directed and had been applied to a different homeward cargo, and also because it had expired before shipping this cargo; nor by the second licence, because the ship's clearance with the second cargo was not indorsed thereon, and also, because if the ship sailed for *London*, the second licence legalized a different voyage from that on which she sailed; and that if she sailed for *Leith*, the Plaintiff could not recover, because that was a deviation from the voyage insured. *Gibbs J.*, before whom the cause was tried at the *London* sittings after *Michaelmas* term 1812, was of opinion that the original licence sufficiently protected the cargo, but reserved the objections, subject to which the jury found a verdict for the Plaintiff.

Shepherd Serjt. now moved to set aside the verdict and have a new trial, upon the same objections. It had been ruled that this cargo of wheat was not protected by the first licence, in a case of *Siffkin v. Allnutt*(a) on this same policy, tried before Lord *Ellenborough* C. J., (which case was also cited at the trial.) He also urged that the owners, by obtaining a new licence, had shewn that they elected to abandon the former licence, even if it would have otherwise served them.

MANSFIELD C. J. The Plaintiff had a licence which was sufficient: he thought he had not one, and he obtained another, which did not serve him: but how did that control the effect of the efficient licence, which he before had? There is nothing in the objection.

GIBBS J. Lord *Ellenborough* himself has since told me that the case cited went off on the ground that the delay which arose before shipping the first homeward cargo, was not sufficiently accounted for. The case then

(a) See *Siffkin v. Allnutt*, 1 *Maule & Selwyn*, 39.

stands thus. The ship sails with a licence, which is to expire on a certain day. A delay had arisen, which was most satisfactorily accounted for, and the cause of it is not removed until after it had become physically impossible that she should get her cargo before the day first specified. On the 16th of *October* she does get her cargo, and as she is coming home, a great part of her cargo is burnt; and the owners finding that it was more expeditious to bring home a cargo of wheat than to obtain pitch and tar, and to make up the deficiency of the mats that were burnt, for the sake of expedition, they so load the ship, and she brings home the wheat; thereby better answering the purpose of the persons who granted the licence, and of those who obtained it. The owners procured a new licence, for a voyage from *Archangel* direct to *Leith*, and the Defendant contended that this was a deviation, but the captain swore it was only his intent to touch at *Leith* for his instructions, and proceed to *London*: the captain did not even know that there existed a new licence: the parties applied for the new licence *ex majori cautela*, but they were under a mistake in thinking the old licence would not protect them.

The rest of the Court concurred in refusing the rule.

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Jan. 27.

BURNE v. RICHARDSON.

A termor, who lets to an under-tenant, cannot, after his term expired, enforce the continuance of the under-tenancy by distress, if the under-tenant refuses to acknowledge him as landlord, or pays him under threat of distress.

Although the under-tenant still retains the possession.

Seemle, that a tenant, whose under-tenant retains the possession after the term, is not liable for mesne profits. *Per Mansfield C. J.*

THE Duke of *Bedford* had demised stalls in *Covent Garden* market to *Hughes*, and *Hughes* had underlet to the Plaintiff as tenant from week to week. *Hughes's* term being expired, the Duke of *Bedford* had circulated a printed notice among all the under-tenants, stating that *Hughes's* term was expired, and that they were to pay him no more rent. After the expiration of the term *Hughes* continued to claim the rent of the Plaintiff for his stall, who paid it several times under a protest that *Hughes* had no right to it, in order to avoid a distress. At length he refused to pay the rent any longer, whereupon the Defendant, as the bailiff of *Hughes*, distrained, and the Plaintiff brought trespass, and at the *Middlesex* sittings after *Michaelmas* term 1812, before *Mansfield C. J.*, recovered a verdict for 3*l.* 18*s.*, which

Blosset Serjt., for *Vaughan* Serjt., now moved to set aside, contending that inasmuch as the ground-landlord was entitled to recover this sum from *Hughes*, under the title of mesne profits, it would be no hardship on the Plaintiff that the distress should be held good, because the Duke was entitled to consider *Hughes* as holding over through the medium of the Plaintiff, and therefore might maintain an action against him for mesne profits. The Plaintiff, knowing that *Hughes's* term had expired, had nevertheless paid him rent subsequently accrued, and had thereby recognized him as his own landlord, and was now estopped from contesting his title.

MANSFIELD C. J. The Duke may recover against the Plaintiff for mesne profits the same sum which *Hughes*

now contends the Plaintiff is bound to pay for rent to himself, but must not the Defendant in an action for mesne profits be the person in actual possession and trespassing?

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GIBBS J. The Plaintiff was weekly tenant under *Hughes*, as *Hughes* was under the duke; both their terms expire, and both have notice of the determination thereof. The Plaintiff says, your term is up, I will pay you no more rent, but I pay the money to prevent a distress: and it is said this is to enable *Hughes* to distrain, when the Plaintiff, at last, declines paying any longer. If this was rent due, was it due by privity of contract, or privity of estate? I conceive by neither. There is no pretence for the motion.

Rule refused.

RULE OF PRACTICE.

Jan. 27.

THE Court on this day again promulgated their rule that no motion for a new trial would be entertained unless two days previous notice should be given of the motion to the Judge who had tried the cause, that he might be enabled to bring down his notes of the evidence, and have them ready in court at the time when the motion should be made.

Two days' notice to be given of motion for new trial.

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(IN THE EXCHEQUER-CHAMBER.)

Feb. 1.

ANONYMOUS.

No interest on affirmation in error of a judgment on a bail recognizance in the King's Bench.

GASELEE moved for interest on the affirmation in error of a judgment obtained on a recognizance of bail, in the Court of *King's Bench*. The Court refused it on account of the difference between the form of the recognizance in the Court of *King's Bench*, and that in the *Common Pleas*, being in the *King's Bench* confined to the amount of the debt.

Jan. 28.

LEVIN v. NEWNHAM.

Whether the place where a vessel casts anchor, is within her port of discharge, is a fact for the jury, not a question of law.

THIS was an action upon a policy effected upon the ship *Harmony*, on a voyage to the *Baltic*, with liberty to wait off any port for information, and the other extensive powers given at this time to the assured in similar policies, and the ship was warranted free from capture in her port of discharge. The cause was tried before *Gibbs J.*, at the sittings after *Michaelmas* term, 1812, when it was proved by the mate of the vessel, that the vessel arrived off *Pillau*, deeply laden, and cast anchor in *Pillau-roads*, two *German* (or eight *English*) miles from the shore, in ten fathoms water, in order to enable the supercargo to get information from the land. It did not appear that the master had received any previous intelligence of danger at *Pillau*. The vessel was there captured. She could have come in nearer to the shore, if the master had so chosen, without unloading. There was a considerable struggle upon the point whether she had dropped anchor there, merely for the purpose of the supercargo's

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cargo's going on shore to obtain information to enable him to select his port of discharge, or whether she cast anchor because she had already chosen *Pillau* as her port of discharge. The charter party described *Pillau* as her destined port, with liberty to call at *Carlsbam* for information. The invoice and bill of lading spoke of *Pillau* as the port of discharge. The Defendant assuming that such was the case, insisted that the underwriter was protected by the warranty. *Gibbs J.* told the jury that this was *prima facie* evidence of an intent to go to *Pillau* as the market, but he directed them, that the owner might alter that intent, and might either suspend it, and wait for information whether it were safe to go into *Pillau* or not, or that he might wholly alter it; and if he had suspended his intention, then, until he had made up his mind, *Pillau* was not his port of discharge; and the learned judge left it to the jury, whether, upon the whole, they thought he had made it his port of discharge or not, but reserved liberty to the Plaintiff to move for a new trial, subject whereto, the jury found a verdict for the Plaintiff.

Pell Serjt., now moved to set aside the verdict, and have a new trial in this and two other causes. He said he meant to make two great questions: first, that the evidence had established the fact, that the assureds had made *Pillau* their port of discharge; secondly, that the vessel, when captured, was within the port. The doubt was, whether it were not a mixed question of law and fact, whether the ship at the time of the capture, were in port or not; though there was circumstances in *Dalglish v. Brooke*, 15 *East*, 303., which did not exist here: he intimated that the learned judge had reserved the point, in consequence of a difference in opinion between this Court and the Court of *King's Bench*, as that

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that Court had expressed their sentiments in the case of *Dalgleish v. Brooke*. [The Court denied that there was any difference between the judgment of the two courts, as the opinion of this Court was expressed in *Keyser v. Scott*, ante, 660. The facts in *Dalgleish v. Brooke* did not support the doctrine there laid down; but this Court adhered to the doctrine, not relied on the facts of that case.]

MANSFIELD C. J. In this case, I have no doubt, that *Pillau* was intended to be the ship's port of discharge, if it were safe: the charter party is made on the 4th of *September*: but at a subsequent time, the 10th of *September*, the time of making the policy, the assurance is declared to be to any port or ports of discharge in the *Baltic*. It would indeed be utter madness in the present political state of *Europe*, for an owner absolutely and irrevocably to fix in this country a ship's port of discharge; and I cannot think that either the owner or the master of a vessel would do it. Extraordinary powers are now given to touch and stay at any port or ports for information. According to all evidence, as well as I recollect, there is no instance of a ship beginning to lighten so far as eight miles from the shore: they cast anchor at that distance for information only.

The Court refused the rule.

Feb. 3.

PENSON, Executrix, v. JOHNSON.

An attorney's bill may be referred for taxation, though it is his executor who sues on it.

THIS was an action brought to recover the amount due to the testator for business done by him as an attorney; and the Defendant had before appearance obtained a rule nisi that the bill might be referred to the prothonotary for taxation, and that the proceedings might

might be stayed upon payment of what should be found due, and the costs.

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Shepherd Serjt. now opposed this rule upon two grounds, first that the Defendant could not be heard before appearance; secondly, that according to the authorities of *Lee Executor v. Knight, Barnes, 119.*; and *Chapple* and another executors of *Gough v. Chapman, Barnes, 122.*, after the attorney's death the bill was no longer a subject of taxation.

The Court held, as to the first point, that it was the daily practice to grant Defendants before appearance a summons for payment of debt and costs; and as to the second point, that the practice was otherwise in the Court of King's Bench, and in conformity thereto, they made the rule to refer the bill for taxation,

Absolute.

REYNER v. HALL.

Feb. 3.

THIS was an action upon the same policy on which the Plaintiff recovered against *Pearson, ante, p. 662.* Upon the receipt of the letters mentioned in that case, stating that the *Constantia* had been taken at *Swinemund*, being forced into port by heavy gales, the parties supposing that the capture was of the nature designated by the warranty against seizure and capture in port, and that therefore the risk had never attached, adjusted on the back of the policy a return of the premium, to which,

A ship was insured, warranted free of capture in port. A letter announcing her capture stated it to be in port, on which the underwriter and assured adjusted, the former returned, and the latter received back, the premium. It afterwards appeared the capture was not in port. Held that the assured was not precluded by the adjustment and repayment from recovering on the policy,

Whether the underwriter's name had been struck off the adjustment only, Or off the policy also.

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 {
 REYNER
 v.
 HALL.

as is usual, the Defendant signed the initial letters of his name, and afterwards actually paid the money; whereupon the Plaintiff's broker struck out the Defendant's initials with a pen, but accidentally omitted to strike out his name from the subscription on the face of the policy. In the case of another policy upon the same risk, the Defendant's subscription on the face of the policy, as well as his initials set against the adjustment on the back, were struck out after re-payment of the premium to the assured. But when the Plaintiff became more fully acquainted with the circumstances, he insisted that the loss had been occasioned by a risk, against which he was protected by the insurance, and he brought this action. Upon the trial of the cause at the sittings after *Hilary* term 1812, the jury found a verdict for the Plaintiff, and *Vaughan* Serjt. had in *Easter* term 1812 obtained a rule *nisi* to set it aside, against which

Shepherd and *Best* Serjts. now shewed cause. They admitted that while both parties were ignorant of the fact, they might, if they had pleased, have entered into an agreement upon that ground, to rescind their contract; but that was not this case. Here the parties settled the account upon a belief that they knew the fact, but they were mistaken; and as they had proceeded to make an adjustment under that mistake of the fact, when the fact was cleared up they were restored to their original situation. They admitted that where both parties, knowing the fact, come to a settlement on a mistake of the law, they are bound thereby (a). *Da Costa v. Frith, Burr.* 1966. would doubtless be cited, but it was not applicable. *Park on Ins.* 6th ed. vol. i. p. 167. The Court in commenting on that case, take the distinction, that there the loss was total at the time of the adjustment and payment, and therefore, although subsequent circum-

(a) See *Brisbane v. Dacres*, post, v. 143.

stances changed it to a partial loss, the settlement should not be rescinded; otherwise, if it had become a partial loss before the adjustment. But here was no change in the circumstances of the vessel. The capture was always a loss protected by the policy, although the parties did not know whether the spot where the loss happened was within or without the port. The Plaintiff had received a part when he was entitled to the whole, which was no accord and satisfaction. And he was not bound by the mistake. •

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 HALL.

Vaughan and Rough Serjts. contra. In *Reynier v. Pearson*, there was no adjustment. The Plaintiff recovered on the merits. Here the Plaintiff was concluded by the settlement. *Bilbie v. Lumley*, 2 East. 469. Where a party pays money, having either the knowledge, or the means of knowledge of the true state of the facts, he cannot recover it back. There the underwriter who paid had omitted to read a letter which was put into his hands. No new facts had been discovered in the present case since the adjustment: the parties, when they made it, construed the facts stated as amounting to an arrival. Under the circumstances, the spot where she was taken must be considered as the ship's port of discharge, because she had selected it for such. *Dalgleish v. Brooke*, 15 East. 295. The parties so considered it, and if they were mistaken, it was a mistake in point of law, which would not enable the Plaintiff to alter the present state of things. *Da Costa v. Frith* was strongly in favor of the Defendant. There was a marked distinction between mere adjustment and actual payment. *Herbert v. Champion*, 1 Campb. 134. *Shepherd v. Chewter*, 1 Campb. 274., note of the reporter, which, as is observed in 1 *Park on Inf.* 6th ed. 167., is very sensible and learned.

MANSFIELD C.J. The ship was lost. The defence made to this action was in some respects similar to that made
 in

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in many of the *Pillau* cases, that the ship was captured in port, where she was warranted by the assured to be free of capture. Upon that question, however, the Plaintiff was clearly entitled to recover. But in answer it is urged, that the Plaintiff having received a return of the premium, which could only be due on the event of the ship's having arrived, the Plaintiff could not recover for a loss. In *Pearson's* case, the only witness examined stated, that the return of premium was accepted on the supposition that the ship was actually at *Swinнемund* when she was taken. Is not this then the case of money paid under a mistake of fact? I think it is, and that this transaction does not defeat the Plaintiff's right to recover.

GIBBS J. I am of the same opinion. The Defendant says, (ingeniously,) that it was a mistake of the law, and that it was agreed that the place where the ship was taken should be considered as being at all events the port. But this is not a correct representation of the case, it was considered that the ship was in point of fact actually at the port of *Swinнемund*.

The Court held that there was no distinction in favor of the Defendant upon the policy which had been actually cancelled. It was only the case of an instrument destroyed by mistake.

Rule discharged.

1813.

WILLIAMS v. LAND.

Feb. 4th

LENS Serjt. had obtained a rule *nisi* for changing the venue from *Devon* to *Cornwall*. The action was case for overturning the Plaintiff in a stage coach in a journey from *Exeter* to *Falmouth*, at the *Cornish* end of the bridge erected across the *Tamar*, which divides the two counties.

In case, the Plaintiff's cause of action arises, so entirely as to retain the venue, in the county where the injury is sustained.

Best Serjt. opposed the rule, first, upon the ground that the contract for conveying the Plaintiff was made in *Exeter*: but the Court held, that though that circumstance would have been an answer to the application if the action had been *assumpsit*, yet that in tort it was immaterial to the cause of action. *Best* then urged, that the negligent driving must have begun in the county of *Devon*, before the coach had crossed the *flum aquæ*.

Per Curiam. The negligence would have been no cause of action, if the injury had not been sustained.

Lens made his rule

• Absolute.

Feb. 4.

RAGGETT v. AXMORE.

The acceptor of a bill for the accommodation of the drawer is not discharged by time given to the drawer.

THIS was an action upon a bill of exchange, brought against the acceptor. It was tried before *Mansfield* C. J. at the sittings after the last *Michaelmas* term, when the defence attempted to be established, was, that the acceptor had accepted the bill for the accommodation of the drawer, without consideration; and that the holder had since given time to the drawer, which, according to the doctrine laid down in *Laxton v. Peate*, 2 *Campb.* 185, in the case of an accommodation acceptance, discharges the acceptor. The jury found a verdict for the Plaintiff, and *Vaughan* Serjt. relying on the same authority, now sought to set it aside and have a new trial.

MANSFIELD C. J. It is probable that the bill was accepted without consideration, but there was no sufficient evidence of that fact, and therefore the point relied on, does not arise. Nevertheless, except in the case cited from *Campbell*, it never was known that any thing passing between other parties could discharge an acceptor, but in the present case it is unnecessary to decide that question. (a)

(a) See *Fenium v. Pocock*, *post*. v. 192.

1813.

LEACH v. HEWITT.

Feb. 4.

THIS was an action upon a bill of exchange purporting to be dated from the *Northampton Bank*, 22 Sept. 1811, and to be drawn by *W. Crooke*, as agent for *Rogers, Crooke, and Company*, upon, and purporting to be accepted by *Rogers and Co.* 83. *Lombard Street*, in favor of the Defendant or order. Upon the trial of the cause at the *London* sittings after *Hilary* term 1812, before *Mansfield* C. J., it appeared that the bill had been indorsed by *Hewitt*, at the request of a person named *Cattle*, who had passed it to *Robson*, who had passed it to *Percy*, who transferred it to the Plaintiff for a valuable consideration; viz. in payment for some wine. When the bill was due, *Dawson and Co.* the bankers of the Plaintiff attempted to present it for payment according to the direction, but found no such house as *Rogers and Co.* in *Lombard Street*, nor, upon enquiry, was there any such house as *Rogers, Crooke, and Co.*, constituting the *Northampton bank*, and the bill was a mere fabrication of *Cattle's*, who assumed the style of *Rogers, Crooke, and Co.* for the purpose of fraud. After four days the holder found the Defendant, who lived in *Clerkenwell*, and at first denied his signature, but afterwards confessed it. The officer had no difficulty in finding him to arrest. The defence was, that he had not had due notice of the dishonour of the bill. On the other hand it was urged, that the Defendant had taken the bill without consideration, and therefore was not entitled to notice, inasmuch as the drawer, who was a fictitious person, clearly had no value in the acceptor's hands, who was also a fictitious person. There was no evidence that the Defendant was party to the fraud. *Mansfield* C. J.

One who without consideration, but without fraud, indorses a bill in which both the holder and acceptor are fictitious persons, is entitled to notice of the dishonour of the bill.

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 v.
 HEWITT.

directed the jury, that if the Defendant were a party to the fraud, he was not entitled to notice, but that if his conduct was not fraudulent, but he took the bill innocently, he was entitled to notice; whereupon the jury found that the Defendant was not privy to the fraud. The Plaintiff was nonsuited for want of notice.

Vaughan Serjt. in *Easter*. term 1812, obtained a rule nisi to set aside the nonsuit, and have a new trial, upon the authority of *De Berdt v. Atkinson*. 2 *H. Bl.* 336. where *Buller J.* lays it down, that the rule requiring notice is only applicable to the case of fair transactions, where the bill or note has been given for value, in the ordinary course of trade. It was said that the insolvency of the drawer did not take away the necessity of notice: that was true where value had been given, but no further. In that case it was plain that the Defendant had lent his name, merely to give credit to the note, and was not an indorser in the common course of business.

Best Serjt. now shewed cause against this rule. The bill was a fraudulent transaction, but the Defendant was no party to the fraud. The officer found him without difficulty. The Plaintiff knew his abode four days after the bill became due; and with diligence applied at an earlier period, the Plaintiff might have found him in time to give him due notice of the dishonour of the bill. The indorser was entitled to notice, unless he had been implicated in the fraud, which the jury had expressly disaffirmed.

Vaughan, in support of his rule, contended, first, that, the evidence shewed that the Defendant was implicated in the fraud, since he had been prevailed on, as he himself declared, by *Crooke*, to put his name on the bill.
 Secondly,

Secondly, even if he were not, the drawer and acceptor being non-entities, he was not injured by the want of notice, and therefore was not entitled to insist upon it as a defence. But further, if he was entitled to notice, he had dispensed with it by not having a known residence. In the case of *Bateman v. Joseph*, 12 East. 433., it was determined, that if the holder cannot find the indorser's place of residence, he needs not to give him notice.

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HEWITT.

MANSFIELD C. J. It is the Defendant's own fault if he has indorsed a bill of persons who cannot answer over to him, and he must be the sufferer thereby, but he has only placed himself in the common situation of an indorser. It appears that the Plaintiff knew where to find him after the fourth day.

CHAMBER J. Mr. *Barnes*, the learned editor of my brother *Bayley's* work on bills of exchange, has subjoined in p. 136. a very sensible note upon the case of *De Berdt v. Atkinson*. He says, "The Court appear to have proceeded on a misapplication of the rule which obtains as to accommodation acceptances; in those cases, the drawer, being himself the real debtor, acquires no right of action against the acceptor, by paying the bill, and suffers no injury from want of notice of non-payment by the acceptor. But in this case the maker was the real debtor, and the payee a mere surety, having a clear right of action against the maker upon paying the note; and therefore entitled to notice, to enable him to exert that right."

GIBBS J. The indorser undertakes to pay, if those who ought to pay do not. Therefore he is entitled to notice, that he may have his remedy against them.

Rule discharged.



1813.

Feb. 8. **ALEXANDER, Demandant; BLEASDALE, Tenant;
HANFORD and Wife, Vouchees.**

Recovery
amended by in-
creasing the quan-
tities of specific
clofes, described
in the deed as
being of knaller
than the true
quantities.

THIS recovery had been suffered of the manor of *Hans Place* with the appurtenances, 4 messuages, 12 gardens, 100 acres of land, 50 acres of meadow, 50 acres of pasture, 60 acres of wood and underwood, and common of pasture for all cattle in *Red Marley*, and *Dabitat*, in the County of *Worcester*, and of all and all manner of tythes arising, &c. within the aforesaid premises. The several clofes were specified in the deed to make a tenant to the precipe by name and computed measure of each; the whole of the land therefore had passed to the tenant to the precipe; the aggregate quantities there stated did not exceed the number of acres stated in the recovery; but upon a recent sale and actual admeasurement, the parcels had been found to contain as follows:

	A.	R.	P.
House, &c. - - -	2	3	8
Three cottages and gardens	1	2	28
Arable and roads - -	156	0	15
Meadow - - -	20	3	26
Wood - - -	35	1	38

271 3 26, being 12 acres more than were mentioned in the recovery. And it was objected on behalf of a purchaser that the estate tail was not well barred as to the whole. It was sworn by the tenant in tail that he had intended to pass, and had given instructions for a recovery to pass the whole. It did not appear that there were any general words to aid the amendment.

Sellon Serjt. had on a former day moved to increase the number of acres in the recovery, upon payment of
the

the king's silver for the additional acres, by adding 12 acres of land, upon which occasion the Court hesitated, and desired the case might be again spoken to: he now moved it again and cited *Powell v. Peach*. 2 Bl. 1202.

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ALEXANDER,
Demandant.

The Court permitted the amendment.

DOE, on the Demise of BOSCAWEN and TOWER,
v. BLISS.

Feb, 9.

BEST Serjt. had obtained, in *Michaelmas* term 1812, a rule *nisi* to set aside the verdict found for the Plaintiff in this ejectment, and have a new trial, under the circumstances, that this was an action brought by a landlord against his tenant, on a forfeiture incurred under a covenant contained in his lease, that he should not sell, assign, make over, underlet or incumber that indenture of lease, or the premises thereby demised. The evidence was that a house on the farm had been underlet year after year by the tenant, with the knowledge of the landlord, who nevertheless received the rent after it, and *Best* urged, that after the condition broken by the first underletting and the forfeiture once waved, the condition was gone for ever, and he cited *Dumpor's case*, 4 Co. Rep. 119. [*Mansfield* C. J. and *Heath* J. agreed, that no doubt that case was the law, but enquired whether there were any licence here? and whether it was contended that the landlord having never before exercised his right to turn out the lessee, that indulgence was equivalent to an actual licence?] *Best* admitted he carried his argument to that extent.

A lessor who has a right of re-entry reserved on breach of a covenant not to underlet, does not by waving his re-entry on one underletting, lose his right to re-enter on a subsequent underletting.

Nor by waving his right to re-enter on a breach of covenant to repair, does he wave his re-entry on a subsequent want of repairs.

The Court granted a rule *nisi*.

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 }
 DOE,
 Ex dem.
 BOSCAWEN
 v.
 BLISS.

On this day, *Shepherd* Serjt. would have shewn cause against the rule, but was stopped by the Court.

MANSFIELD C. J. Certainly the profession have always wondered at *Dumpor's* case, but it has been law so many centuries, that we cannot now reverse it. It does not however embrace the present case.

GIBBS J. This is a question whether the landlord by overlooking a former underletting, has waved the right of re-entry for a subsequent underletting. That is too strong a proposition, I think, to be made much of. For on that principle, if a landlord once knew that his premises were out of repair, and did not sue instantly, he could never after re-enter for a breach of covenant committed by their not being repaired. I suppose the Defendant relies on *Dumpor's* case, and infers that this tolerance is tantamount to a licence, but this is too strong a proposition: we may therefore dispose of this case, without further argument.

Rule discharged.

Feb. 10.

LEE, Demandant; RASHLEIGH, Tenant; RASHLEIGH, Vouchee.

If an estate, of which a recovery is suffered, lies in two counties, there must be a separate affidavit of the caption in each county.

TWO recoveries were suffered of lands in *Kent* and *Essex*. There was only one affidavit stating the caption in both counties. *Heywood* Serjt. prayed that the recoveries might pass upon the production of another affidavit stating the caption in one of the counties, and applying the existing affidavit to the other, so that there might be a separate affidavit of the caption in each.

1813.

BLEASDALE, Demandant; ALEXANDER, Tenant;
EYRES and others, Vouchees.

Feb. 10.

LENS Serjt. moved, that this recovery might pass.

The objection raised to it was that the affidavit of the taking of the acknowledgment by a married woman in *Ireland*, stated only that she knew the intent thereof was "to pass her estate or estates," not saying she knew it was "for suffering a common recovery to pass her estate or estates."

The affidavit of the taking the acknowledgment for a recovery must state that the party knew it was for the purpose of suffering a recovery.

HEATH J. The Court never permits a departure from the usual form. Those words are insufficient.

The Court refused the application.

JACOB, Demandant; ———, Tenant; Duke of
DEVONSHIRE, Vouchee.

Feb. 10.

LENS Serjt. moved to amend a recovery which had

been suffered in 1732 accompanying a conveyance of the antient monastery of *Glastonbury* of the same date, by inserting the parishes of *St. John the Baptist* and *St. Benedict* in *Glaston* otherwise *Glastonbury*. The description was general in the deeds, stating the lands to be situate in the parish of *Glaston* otherwise *Glastonbury*: it was sworn there was no such parish as *Glaston* or *Glastonbury*, but that there were the two parishes of *St. John the Baptist* and *St. Benedict*, and that they were both in *Glaston* otherwise *Glastonbury*, and that the lands described extended into both parishes.

Where lands in two parishes were conveyed as lying in the parish of *G.*, which was the true name of neither of them, nor of any parish, but was an addition equally applicable to both, the Court permitted both parishes to be added to an old recovery.

The Court permitted the amendment.

1813.

Feb. 10.

DOE, on Demise of CLARKE, v. ROE.

In a country ejectment the notice to the tenant in possession may be to appear in the next issuable term, and judgment against the casual ejector may be moved for in that term.

SELLON Serjt. moved for Judgment against the casual ejector. The venue was *Suffolk*. The declaration of *Trinity* term last: the notice was to appear in the next *Hilary* term, instead of *Michaelmas* in the usual way, a term being thus omitted, and in which term the general practice is to move for judgment, but *Sellon* contended that since in a country cause the Defendant had in fact till the next issuable term to appear in, which in this case was the present *Hilary* term mentioned in the notice, it was no injury to the Defendant to shape the notice accordingly, and that it was sufficient for the lessor of the Plaintiff to move for judgment in the course of such issuable term, wherein the Defendant was to appear.

The Court granted him the rule for judgment.

Feb. 10.

KINDERLEY, Demandant; DOMVILLE, Tenant;
Sir C. W. BAMFYLDE, and GEORGE W. BAMFYLDE, Esq. Vouchees.

The Court will not amend a recovery by inserting more parishes, unless it be irresistibly clear that the land in those parishes passed by the deed.

SHEPHERD Serjt. moved to amend a recovery, by inserting the parishes of *Pilton* and *Heanton Punchardin*, under the following circumstances. The tenant in tail had conveyed to trustees in trust to sell, all that messuage or tenement called *East Beer Farm*, and cer-

Although the intention to pass them be sworn to, and the construction of the deed at the worst is only doubtful.

But where the deed clearly passes them, omitted parishes may be added.

tain other farms and hereditaments therein named, in the parishes of *Ashford*, *Piswell*, *Tale*, and certain other parishes therein mentioned, but not including *Heanton Punchardin*, or *Pilton*, all which were known by the names, and were let to the several persons, more particularly enumerated in a schedule thereunder written. The schedule was arranged in columns, in the following form :

KINDERLEY,
Demandant.

Name of the Estate.	Name of the Tenant.	Names of the several Closes in the Estate.	Quantity of each Close.
East Beer Farm, in the Parish of Ashford.	J. Smith.	Blackacre.	A. R. P. 4 2 1.

It appeared that several of the closes enumerated in the third column opposite to the title in the first column, “ *East Beer farm*,” as being comprehended therein, were not in the parish of *Ashford*, in which the rest of *East Beer farm* was situate; but in the adjoining parishes of *Pilton* and *Heanton Punchardin*. And it had been objected to the title, that as to those closes the entail was not well barred, the recovery not purporting to be suffered of any lands in these parishes. It was sworn that those lands were intended to pass. *Shepherd* argued that this amendment might be made by the deed to lead the uses, for that although the deed mentioned only particular parishes, yet this was not the ordinary case, where the description of the estate was circumscribed by the restrictive addition of the parish; if the grantor had entirely conveyed all his *East Beer farm* in *Ashford*, that might have been confined to so much of the *East Beer farm* as lay in *Ashford*, and would not pass the residue; but here he had referred to the schedule, which must therefore be taken as if it had been incorporated in the body of the deed; and then, as he conveys these closes, parcels of *East Beer farm*,

by

1813.
 {
 KINDERLEY,
 Demandant.

by names and quantities, all those parts of the description being correct, though he incorrectly annexes the additional description of *East Beer* farm as entirely lying in *Ashford* parish, whereas these parts of it are in *Pilton*, and *Heanton Punchardin*, the erroneous part of the description must be rejected, but the grant is good: the lessee could clearly recover them in ejectment.

Per Curiam. The case simply put is this. It is a conveyance of an estate called *East Beer* farm, lying in the parish of *Ashford*, which is particularized in the schedule: therein are enumerated the fields, but certain of them lie in other parishes. It is argued that this description suffices to pass the whole estate; but unless the Court could see it irresistibly, there is nothing to amend by: it is not enough that it is doubtful whether it would pass by the deed or not.

The Court rejected the application.

The reporter having examined the deed for general words, and found therein that the parties conveyed all the lands of which the vouchee was seised in the parishes enumerated, "or elsewhere in the county of *Devon*," (within which all the premises were situated) directed a further application to the court; and *Shepherd* accordingly again moved upon that statement, when the Court immediately granted the amendment.

Fiat.

1813.

DOE, on Demise of MAWSON, v. LISTON.

Feb. 11.

THIS ejectment was tried before Wood B. at the York summer assizes 1812. The Plaintiffs were well entitled under a writ of *elegit* which they had sued out upon a judgment in debt obtained against *Aydon* and *Elwell*, to recover the premises which had been set out to them by metes and bounds, against the defendants, who were the *tertenants* to whom the land had been demised by *Aydon* and *Elwell*, unless the estate had before the *elegit* vested in the assignees of *Aydon* and *Elwell*, who had become bankrupts. The Plaintiffs contended, that in order to prove the title of the assignees, it was necessary to prove the bankruptcy of *Aydon* and *Elwell*: and that to prove that, it was necessary to prove the petitioning creditors' debt. The petition was proved to be preferred by the assignees of *Swaine* and Co., and the Plaintiffs then insisted that in order to prove that the debt was due to them, it was necessary to prove the bankruptcy of *Swaine* and Co., and the title of their assignees, for that until it was shewn that the commission against *Swaine* had well issued, although it was proved that *Aydon* and *Elwell* were well indebted to *Swaine*, it was not shewn that they were indebted to *Swaine's* assignees. To this it was answered that the Plaintiffs had given no notice of their intention to dispute the validity of the proceedings in bankruptcy, as was required by the statute 49 G. 3. c. 121. s. 10., and that they were therefore precluded from contesting them. But Wood B. held, that as the title of the assignees

If the title of assignees of a bankrupt's estate, strangers to the record, comes in question incidentally, it must be proved in the same mode as before the statute 49 G. 3. c. 121, although no notice of contesting the bankruptcy has been given by the opposite party.

Whether a deed of composition entered into for the express purpose of committing an act of bankruptcy, will have that effect between parties to that act. *Quære.*

In proving the title of assignees of a bankrupt, if the petitioning creditor was the assignee of another bankrupt, it is necessary to prove the title of the petitioning creditor to be such

assignee, by all the like proof by which the title of the assignee in question is to be proved.

only

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DOE
v.
LISTON.

only incidentally came in question in the course of the defence, and it was not necessarily contemplated by the Plaintiffs that they must impugn the assignees' title, this was not a case to which that provision of the statute was applicable. The defendant therefore in order to answer the objection by the facts, attempted to shew that *Swaine's* commission was well founded, and to prove that the debt was due to the petitioning creditor from *Aydon* and *Elwell*, the Defendant called as a witness the solicitor under the commission against *Swaine*, who after that commission had issued, went to *Aydon* and *Elwell* to demand payment of this debt. He could not however swear as to the words in which the demand was made, whether he had demanded it on behalf of the assignees, or had only demanded the debt generally on behalf of *Swaine*. The Plaintiff therefore urged that this, although it was a good admission by *Aydon* and *Elwell* that they owed the debt to the bankrupt, was no evidence that they owed it to the assignees. *Wood B.* however, thought that this was evidence sufficient of the title of those assignees, and so directed the jury. Another point arose in the cause. In order to impeach the commission against *Aydon* and *Elwell*, it was objected that the act of bankruptcy of *Aydon* and *Elwell* was an act concerted between the petitioning creditors, the assignees of *Swaine*, and the assignees of *Aydon* and *Elwell*: it was an assignment by deed executed by *Aydon* and *Elwell*, and by a person named *Ramsden*, as attorney for the assignees of *Swaine* and Company, and by *Swaine* himself; and it was proved that just before the execution a conversation took place between them, wherein it was agreed that it was better for *Aydon* and *Elwell* to become bankrupts; and that deed was prepared and executed for that express purpose, but the assignees of *Swaine* and Co. were not parties thereto.

Wood

Wood B. reserved this point also, and the jury found a verdict for the Defendant, with liberty by consent for the Plaintiff to move to enter a verdict for the Plaintiff, if the Court should be of opinion that the Plaintiff was entitled to recover.

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 }
 DOB
 v.
 LISTON.

Accordingly *Shepherd* Serjt. in *Michaelmas* term 1812, moved for a rule *nisi*: he observed that no case had hitherto been actually decided on the last point. In the ordinary case where a debtor is denied to his creditor it cannot occur; no creditor calls on his debtor for the purpose of being denied, but if he should call with that intent, the creditor concurring in the act, would be neither defeated nor delayed thereby: therefore it would be no act of bankruptcy. This was the case of a deed, but it was questionable whether the effect of this also were not in like manner done away.

The Court granted a rule *nisi*.

Lens Serjt, in this term shewed cause against this rule for entering a verdict for the Plaintiffs; admitting that it might be the intention of *Aydon* and *Elwell* to commit an act of bankruptcy, no privity to that intention was brought home to the petitioning creditors, and therefore, he contended, the concert did not, as to them, vitiate the commission. He also admitted both on the words and the principle of the statute 49 G. 3. c. 121. that as the assignees were no parties to the record, and this was a case between third persons, wherein the validity of a commission of bankruptcy comes into discussion only incidentally, as a matter of defense, it must be proved as heretofore notwithstanding this statute. But he said it was in evidence that *Swaine* and Co. who had been bankers in *London*, had been under great advances to *Aydon* and *Elwell* by accepting bills, which their assignees paid after the bankruptcy of

Swaine

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 }
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Swaine and Company. It was not incumbent on them therefore to shew that they were legally the assignees of *Swaine* and Company, it was sufficient if they were persons who on behalf of that estate had paid a sum of money, and thereby had become creditors upon the bills. There was enough evidence of this money being due, for when *Aydon* and *Elwell* were applied to by these persons as assignees for the debt, they treat with them in that character.

Shepherd in support of his rule was stopped by

The Court. The objection founded on the statute of 49 G. 3. that there was no notice of contesting the bankruptcy, has no foundation, because the assignees are not parties to this record, and the statute can only apply to persons who might have knowledge that the bankruptcy might be set up, and therefore could give notice of their design to contest it, which is not the case here. The assignees of *Swaine* must previously connect themselves with the bills, in order to shew that they had a right to pay the bills, and they could not connect themselves with the bills without proving themselves to be assignees, which they could not do but through the medium insisted on. It is impossible to say, upon this evidence, that the right of the assignees of *Swaine* and Co. was made out, and therefore the rule must be made

Absolute.

1813.

BURN v. MILLER.

Feb. 11.

THE Plaintiff in his first count declared upon a written agreement between the Defendant himself, and *Sayers* who was his security, whereby, after reciting that the Defendant being in possession of an inn called the *Trafalgar Hotel*, had agreed to let it, from the 2d of *April* 1810 to the 2d of *April* 1811, to the Plaintiff, at a certain rent, upon condition that the Plaintiff, the lessee, should within two months from that date, build a tap room, (which was then floor-high, and the door way whereof was erected) according to a plan to be agreed upon between the parties, the Defendant agreed that he would at the end of the year take and pay for the same at a valuation to be made thereof, except of the part then floor-high, and the door frame; the Plaintiff then averred that he completed the tap-room within two months, and that after the end of the year, he appointed a person to make a valuation, which was made, and that the Defendant re-entered, but refused to pay for it: another count stated that the tap-room was to be built, omitting that it was to be according to a plan agreed on, and averred a refusal by the Defendant to make a valuation, and a third count stated that it was to be built in the manner most convenient to the workmen; but in all the special counts it was averred that the agreement was, to build the tap-room within the two months, and that it was built within that time, and upon the trial of the cause at the *Chelmsford* summer assizes 1812, before *Macdonald* C. B. the agreement was proved as first averred, and it was further proved that no specific plan for the tap-room was ever drawn out or agreed on, that the tap-room was not completed until four months after the date of the contract; that the Plaintiff had constructed

A lessor contracted to pay his tenant at a valuation for certain erections pursuant to a plan to be agreed on, provided they were completed in two months: no plan was agreed on, and after the condition broken, the lessor encouraged the lessee to proceed with the work, and held that the lessee might recover as for work and labour on an implied promise arising out of so many of the facts as were applicable to the new agreement.

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a chamber over the tap-room, that in the progress of the work, and after the two months had elapsed, the Defendant had been heard to say that the chamber above the tap-room would be an useful room, and to ask when would the Plaintiff finish it? if he did not finish it soon, he the Defendant would finish it himself, the expence would be nothing to the Plaintiff, it would all fall upon him the Defendant; but when it was nearly completed, the Defendant said that he should not finish it. At the expiration of the term, the Defendant re-entered on the premises. *Macdonald* C. B. thought, that as no specific plan of a tap-room had ever been drawn out, it was for the jury to consider whether the room over the tap-room had not been carried up with the approbation of the Defendant, and if the jury thought it was, and that it had been finished within the two months, the Plaintiff was entitled to recover on the special counts; but if it was not finished within the two months, then the Plaintiff was entitled to recover upon his counts for work, labour, and materials, and money paid; for he considered that the limitation of two months was inserted with reference to the plan intended to be provided, and as no plan was provided, he thought the condition as to the two months was not to attach. The jury, under this direction, found a verdict for the Plaintiff on the general counts.

Best Serjt., in *Michaelmas* term 1812, moved for a rule nisi to set aside this verdict, and have a new trial, contending that the allegation of completion within two months, having been made, was material to be proved; and that not having been done, the special agreement was wholly out of the question, the condition of completing the building within the time specified not having been performed; and as the Defendant was in his character of landlord entitled, at the expiration of the term,

to whatsoever erections had been attached to his freehold, during the term, unless some special agreement to the contrary had been carried into effect, the Plaintiff could not be entitled to recover on the common counts. The Court granted a rule *nisi*.

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v.
MILLER.

Shepherd Serjt. on this day shewed cause against the rule. He contended that the finishing the room within the two months was not a condition precedent, and though the agreement was not under seal, yet the case was similar to that of charter parties, upon which it often happened that though from particular circumstances no action upon the covenant could be supported, an implied *assumpsit* for freight arose. He cited *Ritchie v. Atkinson* 10 *East*, 295. The Defendant, by again taking possession of the premises, furnished evidence of a contract to pay for them; that was necessarily an adoption of all the Plaintiff's acts.

The Court interposing, called on *Bell* to support this rule.

He contended that if the tap-room were not finished in two months, which was clearly a condition precedent, the Plaintiff was not entitled to recover any thing. This case was very distinguishable from *Ritchie v. Atkinson*. It had been thrown out, that another agreement arose out of the facts, but the Plaintiff had declared on the original, not on the substituted agreement, therefore he could not recover on his special contract. The Plaintiff could not recover on the general counts, because the work, labour, and materials, were used about a house in the occupation of the Plaintiff himself. If a tenant from year to year lays out money in adding erections to a house which he inhabits, he cannot, at the end of his term, recover from his landlord the money he has so expended. Neither, if a man contracts to erect a build-

does not the Plaintiff go on, the expence is nothing to him, the expence will be mine ? and he says respecting the room above, that it will be very convenient.

Rule discharged.

1813.
BURN
v.
MILLER.

COLVILLE, Demandant ; DENISON, Tenant ;
ACTON, Vouchee.

Feb. 12.

BY the marriage settlement of *John Acton*, and *Elizabeth Lambe*, made in 1680, *John Lambe* conveyed to the uses of the marriage (*inter alia*) the manors of *Illary's* and *Spencer's*, in the several parishes of *East Bergholt*, *Brantham*, *Stratford*, *Great Wenham*, *Little Wenham*, *Capel*, *Holton*, *Tattingstone*, and *Bentley*, in the county of *Suffolk*. The vouchee, who was the great grandson of *John* and *Elizabeth Acton*, but whose title did not appear, had agreed in 1796 to sell the whole of these two manors with their appurtenances to *J. Reade*, and conveyed them by lease and release, of 4 and 5 July, 1796 ; but they were described in a recovery suffered of *Michaelmas* term 1796, for the purpose of effectuating that sale, as the manors of *Illary's* and *Spencer's* in the parish of *East Bergholt*. The devisee of *J. Reade*, having devised the manors in trust to sell, and that *P. Godfrey* should have the pre-emption at a price therein named, which he had accepted ; an objection was now raised to the title of such parts of the manors as lay in the several parishes other than *East Bergholt*, that those parts had not passed by the recovery of 1796, and that an entail was, as to them, still subsisting. *Sellon* Serjt. now moved to amend the recovery, by inserting the several parishes of *Brantham*, *Stratford*,

Conveyance to make a tenant to the precipe of the vouchee's manor of *J.* in the parish of *B.* and of all his manors and lands in *B.* or in any town or town next or near adjoining thereto. Recovery of the manor of *J.* in the parish of *B.* amended by inserting six other parishes, upon affidavit that the manor of *J.* extended into those six parishes, that they were adjoining to *B.* and that the vouchee had exercised ownership over those parts before the sale and not since, and that they were intended to pass.

1813.

COLVILE,
Demandant.

Great Wenham, Little, Wenham, Capel, Holton, Tattingstone, and Bentley, upon an affidavit of the steward of the vouchee, detailing the facts above stated, and the further facts that each of the manors of *Illary's* and *Spencer's* was partly in *East Bergholt*, but that each of them also extended into several of the parishes above named, which were adjoining thereto, and that the vouchee, and his father for sixteen years before him, had exercised acts of ownership over such parts of the manors as lay in those parishes, by granting copyhold estates in each of the parishes as parcels of those manors, continually up to the time of the sale, and that the vouchee had not exercised any act of ownership over those parts since; but considered them as sold, and that they were intended to pass, and that there were no other manors of the same names in the county.

The Court held, that it was impossible for them to extend the recovery further than the deed to lead the uses would warrant, and that deed was not shewn to pass any thing more than such parts of the manors as were in *East Bergholt*. If the deed of 1796, had referred to all the estates comprized in the deed of 1680, then the Court might have made the recovery refer to, and be co-extensive with the same estate, but otherwise not; here no connection whatever was shewn between the deed of 1680, and that of 1796; and they refused the application.

The reporter having inspected the deed of 1796, directed the motion to be renewed with an additional statement of a part thereof, whereby the vouchee conveyed "all other his manors, advowsons, lands, hereditaments, and appurtenances whatever, situate in the said parish of *East Bergholt*, in the county of *Suffolk* or in any other town or towns next or near thereunto

"adjoin-

“ adjoining ;” and upon the reading of this part of the deed, coupled with the affidavit above stated, of the vouchec’s former possession of land in those parishes, and intention to pass the whole, *The Court*

COLVILLE,
Demandant;

permitted the Amendment.

INGLE v. TROTTER.

Feb 22.

THE Plaintiff had served the Defendant with a summons, and he had filled up the blank left in the form of the *English* notice prescribed by the statute 51 G.3. c. 124. s. 2., which is left for the day of the month and year, after the words “ at the return hereof, “ being,” with the words “ from *Easter-day* in one “ month.” The Defendant in person had obtained a rule *nisi*, to set aside the *distringas* which had subsequently issued, for this irregularity ; against which

Summons and *English* notice to appear at the return of the writ, “ being from *Easter-day* in one month,” is bad.

Lens Serjt. now attempted to shew cause.

The Defendant supported his rule.

Per Curiam. The act is imperative, that the month and day of the month shall be inserted.

Rule absolute.

1813.

Feb. 12.

ROBERT BROWN v. W. BROWN, and JUBB.

In an action upon a joint contract against two, one who has suffered judgment by default is not admissible as a witness against the other to prove that he joined in the contract.

Because if, the Plaintiff succeeded in the action, the witness would obtain, by means of his own testimony, contribution against the other.

THIS was an action of *assumpsit* for money paid. Upon the trial of the cause at the *York* summer assizes, 1812, before *Bayley J.*, the case was, that the Defendants had been partners in trade, and in the course of their dealings had issued bills, which came into the hands of *Pearson*, and which, when due, were not honoured. *Pearson* agreed to give the Defendants time for payment, upon their finding a security. The Plaintiff accordingly entered into a bond; a counterbond from *W. Brown* and *Jubb* to the Plaintiff was prepared, but the Defendants after many excuses refused to execute it. The Plaintiff having been obliged to pay the money, now sued the principals to recover it over. The Defendant *William Brown* suffered judgment by default: the Defendant *Jubb* defended himself upon the ground that he had never assented to the giving of the bond; and *Pearson*, being called as a witness, said, that he believed the Defendant *Jubb* had never been consulted on the point. To prove the assent of *Jubb* to the transaction, the Plaintiff proposed to call the Defendant *William Brown*; whereupon it was objected, that he was not admissible. The Plaintiff in behalf of his admissibility cited *Doe on Demise of Harrop v. Green*, 4 *Esplan.* 198. *Bayley J.* held that the witness was inadmissible, and a verdict passed for the Defendant, with leave to move to enter a verdict for the Plaintiff, for '513*l.*, if the Court should think the evidence was admissible.

Lens Serjt. in *Michaelmas* term 1812, moved accordingly to enter a verdict for the Plaintiff, or to have a new trial. He contended that the witness was admissible, because he was called to speak against his own interest, for

for a judgment against one of two on a joint contract, he said, could not be supported, judgment must be obtained against both.

The Court granted a rule *nisi*.

1813.
BROWN
v.
BROWN
and Another.

Cause was afterwards shewn by *Best* serjt.; *Lent* in support of the rule.

MAWFIELD C. J. now delivered the opinion of the Court. The question here was on the admissibility of *William Brown*, whom *Bayley* J. did not receive as a witness; and we are of opinion that he was right in the rejection. It appears this witness was interested in the event of the suit, and interested certainly in respect of that very evidence which he was called to give, because he came to prove that the other Defendant was equally liable with himself, which would give him a right of contribution from *Jubb*, if the Plaintiff succeeded; but if the action failed against *Jubb*, then the consequence would be, that *William Brown* alone would be responsible to the Plaintiff for the whole of his demand. [Here his lordship read the case of *Chapman v. Graves* and two others, 2 *Camp. N. P. Cas.* 333. n.]

Rule discharged.

1813.

Feb. 12.

COLES v. BARROW and Another, Assignees of
COLES.

If the assignees of a bankrupt manufacturer employ him in carrying on the manufacture for the benefit of the estate, and pay him money from time to time, this is evidence of such a contract between him and his assignees as will enable him to recover from them a reasonable compensation for his work and labour.

THIS was an action brought to recover a compensation for the Plaintiff's work and labour. Upon the trial of the cause before *Graham B.* at the *Dorchester* summer assizes 1811, it appeared that the Plaintiff had been the owner of a cloth manufactory, he had since become a bankrupt, and had not yet obtained his certificate; after his bankruptcy the assignees deemed it beneficial to the bankrupt's estate, to continue the work, and they not only wrought up the old materials which had been purchased before the bankruptcy, but also purchased new ones and wrought them. They employed the bankrupt in superintending the work and also in working at the looms and other manual operations. The Plaintiff proved no contract for any specific salary, but one of the Defendants had paid him money from time to time, to the amount of 7*s.* per week, and had been heard to say that he ought to have much more; some witnesses estimated the value of his labour at 14*s.* per week. The Plaintiff had delivered a demand to the amount of 14*l.* and the Defendants had paid him money since that demand had been delivered. On the occasion of some dispute which arose between the Plaintiff and the Defendants, the latter refused to pay him any thing more, whereupon he brought this action. For the Defendants it was contended that this action could not be supported, and *Graham B.* held, and reported, that he conceived no such contract could be formed in law between a bankrupt and his assignees, and accordingly nonsuited the Plaintiff.

Pell

Pell Serjt., in *Michaelmas* term 1811, moved for a rule *nisi* to set aside the nonsuit, and have a new trial. He urged that none of the decided cases went so far as to hold that an uncertificated bankrupt could not maintain such an action against his assignees, and the reason of the law favored the action, for it had in many cases been held that the assignees could not let out the bankrupt's labour for the profit of the estate; the law took from him all the property he had at the time of the bankruptcy, and if he might not work for himself, and receive the produce of his labour, he must starve. It had happened that all the cases hitherto decided had occurred between the bankrupt and a stranger, not between himself and his assignees, but the principle was the same in the one case as in the other. *Chippindale v. Thomlinson*, *Cooke. Bankrupt Law*, 3 ed. 518. *Silk v. Osborne*, 1 *Esp. N. P.* 140. *Webb v. Fox*, 7 *T. R.* 391. *Webb v. Ward*, 7 *T. R.* 296. In none of these cases do the Courts go the length of saying that the assignees are entitled to the fruits of the bankrupt's personal labour. In *Ex parte Proudfoot*, 1 *Atk.* 253. Lord *Hardwicke*, indeed, says, "the bankrupt is incapable of carrying on any trade, and all his future personal estate is affected by the assignment, and every new acquisition will vest in the assignees; but as to future real estates there must be a new bargain and sale." This however does not distinctly extend to the fruits of the bankrupt's personal labour.

Mansfield C. J. observed, that the work done by a bankrupt for the benefit of his estate, was in a degree for his own personal advantage, inasmuch as, if the dividends were increased in a certain ratio, his allowance was increased, and if there was any surplus, it was entirely his own.

Lawrence J. observed, that it had been determined that an uncertificated bankrupt might recover for the value

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v.
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1813. value of his labour, if his assignees did not interfere to prevent him; but in this case the Defendants, who were to be considered in two characters, did so interfere.

COLES
v.
BARROW.

The Court with some difficulty granted a rule *nisi*.

Best Serjt., in *Easter* term 1812, shewed cause against this rule. It was, he said, a clear principle of law, that when a man is a bankrupt he is completely divested of all that he had at the time of his bankruptcy, and by numerous cases it had been decided that no property could be acquired by him before he had obtained his certificate, but that all belonged to his assignees: and therefore to what purpose should his assignees pay to him with one hand, that which they were entitled to receive back with the other? Though the case of *Chippendale v. Thomlinson* decided that a bankrupt might sue for the proceeds of his personal labour, yet it did not decide that the assignees might not take from him the fruit of his judgment when recovered. Numerous subsequent cases have decided that he may sue for the benefit of his assignees. The judgment of Lord Mansfield in *Chippendale v. Thomlinson* is the strongest authority that can be cited in favor of the Plaintiff: but this case is materially qualified by *Buller J.*, who explains the case *ex parte Proudfoot* only to mean that the bankrupt may recover if his claim is not interrupted by the assignees. In *Webb v. Ward* and *Webb v. Fox*, the Court held that an uncertificated bankrupt may sue in trover for his own property, if his assignees interfere not. *Peake N.P. Cases*, 145. *La Roche Bart. v. Wakeman*. In numerous cases where an uncertificated bankrupt has sued, the Courts have staid proceedings till the assignees have given security for the costs. In *Silk v. Osborn*, Lord Kenyon C. J. held, that where work and labour was mixed with the bankrupt's materials, he may

may maintain an action for both, however the case might be, if the assignees interposed their claim. 7 *East*, p. 53. *Kitchen v. Bartsch*. There the question was, whether, it appearing on the pleadings that the assignees required payment of a note given to the uncertificated bankrupt since his bankruptcy and assignment, and not included in any subsequent assignment, the bankrupt could recover on it; and the Court held that he could not, and *Lawrence J.* cited *Buller's* judgment in *Chippendale v. Thomlinson* from his own MS. Unless a distinction can be made between that personal property which is the profit of labour, and other sorts of personal property, the Plaintiff cannot recover. It is unnecessary to argue here that a bankrupt may not make a special contract with the assignees, for that is not the present case.

Pell, contra. The proposition contended for by the Defendant amounts to this, that all the bankrupt's property vests in the assignees, both what he has at the time of his bankruptcy, and whatsoever he may gain after the commission and before certificate. So that if a bankrupt has worked with the utmost diligence for the support of himself and family, his assignees may intervene, and claim the wages to be paid to themselves, not to the bankrupt. But that is not so, the produce of a bankrupt's personal labour, whether paid to him through the intervention of a suit at law, or without suit, to the extent of his reasonable necessary subsistence, is not his assignees' property, but his own. It might be different if he amassed a great sum of money, and laid it out in the purchase of real estates. He did not impugn any of the cases cited, but they did not touch the present question. There must be a new bargain and sale after the bankruptcy. [*Mansfield C. J.* The second assignment of land acquired, supposes

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supposes the commissioners to have a right; otherwise the assignment would be waste paper.] In the case cited from *East*, which was an action by the bankrupt on a promissory note, it does not appear what was the consideration for which the note was given, and unless it were acquired by the produce of the personal labour of the bankrupt, it does not touch this question. In *Webb v. Ward*, Lord Kenyon C. J. fairly contemplates that the produce of the bankrupt's personal labour does not form part of the effects to be distributed under the commission. He says at the end, this is not an action for the fruits of his personal labour since his bankruptcy, but for goods which, if they belong to him at all, must by law be vested in his assignees. No authority is to be found which at all proves that in the case of a bankrupt's personal labour, the assignees are entitled to it. Lord Alvanley C. J. in *Hesse v. Stevenson*, 3 Bos. & Pull. 578. says, "they cannot indeed take the profits of his daily labour. He must live." This is an express authority. But here the assignees themselves, if they had such a right, have waived it, by employing the Plaintiff, and contracting with him; the contracting by a lord with his villain was a manumission. The same broad ground of policy and humanity ought to prevail here, the very circumstance of contracting with him ought to operate to enable the bankrupt to make such contract for his own benefit. No man will venture to work when he is not sure of his pay. The Plaintiff is also entitled to recover upon another ground, viz. that if this defence is of any avail, the Defendants ought to have pleaded specially, that the Plaintiff was a bankrupt, and that they were his assignees, and that he therefore cannot maintain this action against them.

Best

Best replied on the *dictum* of Lord *Alvanley*, that it was strongly in favour of the Defendants: he only says, that the bankrupt is entitled to the profits of his daily labour; perhaps the assignees cannot take his daily meal out of his hand; but it is for the Court to say, whether if he were to recover a considerable accumulation, like this sum, he might not be summoned before the commissioners, and obliged to refund it.

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MANSFIELD C. J. It is very common for the assignees, how wisely, may sometimes be doubted, but in some cases usefully, to employ the bankrupt in the management of their affairs, and it is usual to make the bankrupt an allowance at the end. And if the assignees had made an express contract, it might be very hard to say that they had not given up their right, and that they were not bound to pay, but this is not that case, here is no evidence of any contract. In many of the cases cited the whole question has been whether the Court should interfere to require security for the costs. No doubt, in such an action where the bankrupt is permitted to sue for his own benefit, the Court will not interpose to compel that security from a bankrupt, if the assignees do not claim the property. Where the bankrupt sues for their benefit, there the Court will compel security from him, but that does not establish the proposition contended for.

HEATH J. Here is a payment in part, and it may be questioned whether that is not evidence of such a positive contract. If there were not an implied contract, how could the assignees justify to the creditors giving the bankrupt any thing?

CHAMBRE J. This case is infinitely stronger in favor of the bankrupt than was the case of *Chippendale v. Thomlinson*. There it was held the bankrupt might recover,

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v.

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cover, if the assignees did not interfere, and if there were an implied assent; and here is, not merely an implied, but an express assent; where the assignees employ the bankrupt, and have held all the benefit of his labour, and make him a payment in part, I think it would be a monstrous thing if this 'action' were not maintainable.

Cur. adv. vult.

MANSFIELD C. J. in this term delivered the opinion of the Court, *Heath J.* being absent.

This was an action brought by the plaintiff, who was a cloth-dresser, and had become a bankrupt, against his assignees. The evidence disaffirmed any express agreement having been made by the Defendants to pay wages to the Plaintiff, and the claim of the Plaintiff was upon a common *quantum meruit* for work and labour. My two brothers (a) are of opinion, that the nonsuit was wrong, and that the rule must be absolute. I was of another opinion, as thinking that all rights, and all goods due to the bankrupt, are vested in the assignees. I have never been able to change my opinion; but I now entertain a considerable degree of doubt, on account of the opinion of my learned brothers, the present rule therefore must be absolute, and the nonsuit must be set aside.

Rule absolute.

(a) *Lawrence J.* had resigned and *Gibbs J.* was not on the bench when it was argued.

C A S E S

ARGUED AND DETERMINED.

IN THE

1813.

Courts of COMMON-PLEAS,

AND

EXCHEQUER-CHAMBER,

AND OTHER COURTS,

IN

Easter Term,

In the Fifty-third Year of the Reign of GEORGE III.

WALLIS v. LADF. (a)

May. 6.

THE memorial of an annuity noticed a bond to the Plaintiff in 600*l.* for securing the annuity, and also a warrant of attorney, "and which said bond and warrant of attorney were respectively executed by the Defendant in the presence of *Thomas Chapman*, clerk to *Charles Harman*, of *Wine-office Court, London*. * *Best* Serjt. had in the last term obtained a rule nisi to set aside this warrant of attorney, upon the ground that the memorial did not, as required by stat. 17 G. 3. c. 26. s. 1, "contain the name of the witness."

It is sufficient in the memorial of an annuity to state that the securities were executed "in the presence of T. G. of, &c." without expressing that he subscribed his name as attesting witness.

(a) *Mansfield* C. J. was prevented by indisposition from attending in court until the 13th of May.

1813.

WALLIS

v.

LADE.

Vaughan Serjt. shewed cause. It contains the name of *Chapman*, who was in fact the only attesting witness, and that is all which the act requires.

Best, in support of the rule. The memorial contains the name of *Chapman*, but it does not state that *Chapman* attested. The warrant of attorney might have been executed in the presence of an hundred persons, of whom one only may have attested, and this memorial does not guide the Defendant to find that one. *Chapman* might, consistently with what appears here, have been accidentally in the 'room,' not attending to what was passing.

HEATH J. We think it sufficiently certain in this case to a common intent. The persons in whose presence it was done must be presumed to be the witnesses: if they are not, the defendant will have the advantage of it when the annuity is to be enforced.

CHAMBER J. The act requires nothing more than the name, and it is given. If *Chapman* was not a subscribing witness to the bond, the Defendant may, if sued thereon, resist payment, upon the ground that the subscribing witness whose name shall appear on the bond when produced, is not mentioned in the memorial.

GIBBS J. There can be no danger of that which the Defendant apprehends. The Plaintiff cannot use his warrant of attorney without filing it; he cannot file it without giving thereby to the Defendant an opportunity of seeing it and seeing who are the witnesses; and if it then appears that they are not all named in the memorial, the annuity is void.

Rule discharged.

1813.

WATSON v. MAINWARING and Others.

May 6.

THIS was an action brought by the executors of Dr.

Watson, deceased, against the *Equitable Insurance Office*, to recover a sum which had been insured on his life. Upon the trial of the cause at the sittings after *Hilary* term 1813, before *Gibbs J.*, the office resisted the demand on the ground that when the policy was effected the deceased had, (in breach of his declaration to the contrary,) a disorder tending to shorten life, and that the policy was therefore void. For the Plaintiff it was proved by an eminent physician of *Bath*, to whom Dr. *Watson* had applied for advice, that his disorder was an affection of the bowels; that this disease may proceed from either of two causes, the one a defect of some of the internal organs, the other a mere *dyspepsia*: that the first would tend to shorten life; that the second, though it renders the patient uncomfortable, does not generally, unless it increases to an excessive degree, tend to shorten life, and that the complaint with which Dr. *Watson* was afflicted was not the organic *dyspepsia*. Several other medical men stated that they had attended Dr. *Watson* since the policy had been effected, and that he was then quite free from the disorder. On the other hand, several medical persons stated, as witnesses for the Defendants, that they had seen him at the time of his visiting *Bath* previously to effecting the insurance, and that they then considered him as a falling man. It was left to the jury whether the patient's complaint was the organic *dyspepsia*, and if it was not, whether the *dyspepsia* under which he laboured was at the time of effecting the policy of such a degree, that by its excess it tended to shorten life. The jury found that it was neither organic nor excessive, and gave a verdict for the Plaintiff.

It is not to be concluded that a disorder with which a person is afflicted before he effects an insurance on his life, is a "disorder tending to shorten life" within the meaning of the declaration required by the *Equitable Insurance Office*, from the mere circumstance that he afterwards dies of it, if it be not a disorder which generally has that tendency.

1813.

WARREN

v.

MAINWARING.

Shepherd Serjt. on this day moved to set aside the verdict and have a new trial, contending that since the assured afterwards died of the same disorder which he had before effecting the policy, that circumstance was conclusive proof that he was then afflicted with a disorder tending to shorten life.

CHAMBERLAIN J. All disorders have more or less a tendency to shorten life, even the most trifling; as for instance, corns may end in a mortification; that is not the meaning of the clause: if *dyspepsia* were a disorder that tended to shorten life within this exception, the lives of half the members of the profession of the law would be uninsurable.

GIBBS J. According to the rule contended for, the assured, to be insurable, must have no disease at all. It cannot be said that this was not a case, if ever there was one, fit to be left to a jury; and though the office had very good grounds to try the cause, since it has been fairly submitted to a jury, there is as little ground for the Court to interfere, as in any case that ever was tried.

Rule refused.

May 6.

HERNE v. BEMBOW.

Case for per-
missive waste does
not lie against a
tenant by lease,
who has not cove-
nanted to repair.

THE Plaintiff declared in case in the nature of waste, and alleged certain buildings in the Defendant's occupation to be ruinous, prostrate, and in decay for want of needful and necessary reparations. There was also a count for obstructing a way. The Defendant suffered judgment by default. The premises were demised by the Plaintiff to the Defendant by lease, which contained no covenant to repair. Upon the execution of a writ of

inquiry, the under-sheriff directed the jury to inquire what sum it would take to put the premises into tenantable repair. The jury however rejected that rule, and gave very small damages.

1813.
HERNE
v.
BEMBOW.

Shepherd Serjt. now moved to set aside the inquisition, and that the case might be submitted to another jury, contending that the damages ought to have been the sum sufficient to enable the Defendant to keep up the premises in as good repair as they were in, when the Defendant took them.

Per Curiam. Whatever duties the law casts on the tenant, the law will raise an *assumpsit* from him to perform, (if there be no covenant in his lease for the performance,) but that is a very different case from a declaration framed in tort like this. If this action could be maintained, a lessor might declare in case for not occupying in an husbandlike manner, which cannot be. The facts alleged are permissive waste: an action on the case does not lie against a tenant for permissive waste. *Countess of Shrewsbury's case*, 5 Co. 13. If therefore we were to grant this motion, the Defendant would meet the Plaintiff in a manner he would not like.

Rule refused.

DAVIES v. LOCKETT.

May 6.

THE Plaintiff was a minor, and sued by his *prochein amy*. About a fortnight before the trial of this cause at the *Hereford* spring assizes 1813, before *Grabam B.*, *Davies* the guardian was removed by an order of the High Court of Chancery, and *Lane* was substituted for him. The record went down with the name

If a guardian is changed pending an action, the fact ought to be stated by an entry on the record.

1813.

DAVIES

v.

LOCKETT.

of *Lane* as guardian in the *nisi prius* record, and *Davies* in the other proceedings.

After verdict for the Plaintiff, *Bess* Serjt. now moved for a rule *nisi* to arrest the judgment on account of this apparent inconsistency. But

The Court was clear, that if the Plaintiff were to make an entry on the record noticing the change of the guardians, all would be well. It would not be proper to change the names throughout, for that would falsify the fact; and they

Refused the Rule.

May 8.

GRETTON v. DIGGLES.

A trustee, to whom two leases were assigned in trust for securing an annuity, having said to the occupier of one of the demised houses, "You must pay the rent to me. I am become landlord for my client, who has the annuity, and you must pay the ground-rents for me." Held that the trustee was liable in covenant to the lessor, as assignee of both leases, for non-payment of rent and not repairing.

THIS was an action of covenant for non-payment of rent, and not keeping buildings in repair, brought against the Defendant, as assignee of two leases granted by the Plaintiff, the one to *Headon*, the other to *Macdonald*. The Defendant had pleaded, first, *Non sunt facta*; 2. and 3. that *Headon's* and *Macdonald's* estates respectively, did not vest by assignment in the Defendant; 4. that the Defendant did not become possessed of the premises in manner and form. Upon the trial of the cause at the sittings after *Hilary* term 1813, before *Gibbs J.*, the evidence was, that the leases were assigned to the Defendant as trustee for *Fidell*, to whom an annuity had been granted by *Headon*, with the usual powers of entry and distress, in trust to permit *Headon* the grantor to take the rents until default in payment, and thereafter to raise and pay the annuity to *Fidell*; and as to the surplus of the rents, which might remain after discharging the annuity, in trust for *Headon*,

don. A tenant who occupied one of the houses proved that *Headon* having become a bankrupt, the witness applied to the Defendant to inquire to whom he, the witness, ought thenceforward to pay his rent. The Defendant said, You must pay the rent to me; I am become landlord for my client who has the annuity, and you must pay the ground-rents for me. The jury upon this evidence found a verdict for the Plaintiff.

1814.
GRETTON
v.
DIGGLES.

Shepherd Serjt. now moved for a rule *nisi* to set aside the verdict, and have a new trial. He urged that the Defendant having no beneficial interest, nor having had any actual possession of the premises, which were in the occupation of the tenants of *Headon* and *Macdonald*, he was not liable for ground-rents and repairs. The Defendant stands in the condition of a mortgagee out of possession, who, according to the case of *Eaton v. Jacques*, *Doug.* 455., is not liable in covenant as an assignee. If the mortgagee of a leasehold requires and receives the rents from the occupier, not as from his own tenant, but demanding them as the agent of the mortgagor, he might, according to the doctrine now contended for, subject himself to all the lessee's covenants in the lease; it is therefore necessary to adhere to the known line, that unless the mortgagee has recovered the actual possession he cannot be charged. The Defendant could not have recovered the actual possession, because the premises were demised to other occupiers; he could only obtain the rents. At all events the evidence applied only to *Headon's* house, and did not affect the Defendant with the possession of *Macdonald's*.

HEATH J. The evidence shews an assent of the Defendant to the whole conveyance.

CHAMBER J. The Defendant assumes the right conveyed to him in the deed.

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GIBBS J. There is evidence of an admission by the Defendant that he was assignee. The Defendant does that which approaches as nearly to an entry on the land assigned as was possible under the circumstances. He could not take the actual possession of the land, because it was let, but he tells the tenant that he is the landlord. This admission must be connected with the assignment and grant to the Defendant, and then he stands as landlord of both houses. There was no distinction made at the trial between the cases of the one house and of the other: the only question made, was, whether the species of possession was sufficient to charge the Defendant. The Defendant is entitled to the receipt of the rents; this is the legal operation of the deed: all the residue is the circumstance of his trust. The conversation which passed between the occupier and the Defendant amounted, on the one side, to an agreement to pay rent, and on the other to a claim of title.

Rule refused.

May 8.

RITCHIE v. ST. BARBE.

It seems that an averment that A. is the sole owner of a ship to a certain day, is not disproved by evidence that he executed a bill of sale of a part, before that day and that on that day the requisites of the register acts were complied with.

THIS was an action upon a policy of assurance made on the 11th of December 1810, at and from *Plymouth* to *Savannah* and *Amelia Island*, upon the ship *Little Sally*. The Plaintiff averred, that he was at the time of effecting the insurance, and from thence until the 19th day of December 1810, interested in the said ship to the amount of all the money insured thereon; and that he the Plaintiff, together with one *Edmund Maude*, were then and there, to wit, on the day last aforesaid, and from thence until and at the time of the loss, interested to the like amount. The cause was tried at *Guildhall* at the sittings after

after *Hilary* term 1813, when the loss was proved by a condemnation under the *American* non-intercourse act. As to the interest, the evidence was, that on the 7th day of *December* 1810, the Plaintiff, who before that day had been the sole owner, executed a bill of sale of a certain proportion of the ship *Little Sally*, then at sea, to *E. Maude*; but that the registration was not completed until the 19th of that month. For the Defendant it was objected that the allegation was not proved, that the Plaintiff was solely interested from the 11th until the 19th of *December*; for that after the registration was completed, the title of *Maude* had relation back to the day of executing the bill of sale; and that the Plaintiff must therefore be nonsuited. The jury however found a verdict for the Plaintiff, which

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Shepherd Serjt. now moved on the same ground to set aside: he urged that *Maude* ought not to be permitted to state that he was not owner till the 19th of *December*, when in truth it was his own fault that he was not owner till the 19th of *December*; a good bill of sale having long before been made, reciting the certificate of registry as it ought to do; and all the ulterior acts that were necessary to complete the title, remained to be done by himself: for it is remarkable, that though the act 34 G. 3. c. 68. §. 15. requires the indorsement to be made on the certificate of registry by the seller, if the ship is at home, when sold, yet, on sale of a ship at sea, it is, by §. 16., to be done by the buyer; and he cannot take advantage of his own neglect. The assignee of a lease completes his title by entry; but on entry, his title is good by relation from the date of the assignment. So, here; when the buyer has done that which the act requires, the purchaser's title takes effect by relation from the date of the bill of sale.

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HEATH J. It appears to me that the interest was in the Plaintiff as averred.

GIBBS J. There is an authority in the Court of King's Bench, *Moss v. Gharnock*, 2 East, 392., that there is no title in a purchaser till the documents are completed. There is a case, of *Hubbard v. Johnstone*, ante, 3. 209., in which my Brother Wood B. has thrown out a doubt upon the propriety of that decision, but upon a strict technical objection such as this is, we should not be inclined to let in that objection now, when the merits were on the other side. (a)

Rule refused.

(a) See *Palmer v. Moxon*, 2 Maule & Selw. 43.

May 8.

MAKEPEACE v. JACKSON. •

A callico printer is entitled, after having discharged his head colourman, to the book in which that servant has entered the processes for mixing colours during his service, although many of his book; it was written on paper which he had furnished; and all the entries were made by the Plaintiff while he was the Defendant's servant; and the Defendant could not conduct his business of a callico printer without the book. Every printer has a standard colour, consisting of certain ingredients, to which standard every colour that he compounds is preferred; and whenever any colour is mixed, the history of the process and ingredients is entered in a book, and when the mixture is made, and a piece of callico is dyed accordingly, a

THIS was an action of trover for a book. It was tried at the *Middlesex* sittings after *Hilary* term 1813, before Gibbs J. The Plaintiff had been head colourman in a callico printer's shop. The book contained certain entries. The Plaintiff contended the book was his property. The Defendant contended it was his book; it was written on paper which he had furnished; and all the entries were made by the Plaintiff while he was the Defendant's servant; and the Defendant could not conduct his business of a callico printer without the book. Every printer has a standard colour, consisting of certain ingredients, to which standard every colour that he compounds is preferred; and whenever any colour is mixed, the history of the process and ingredients is entered in a book, and when the mixture is made, and a piece of callico is dyed accordingly, a

small

small strip is cut off and pasted into the book; and all future orders for goods are received, and the goods prepared, with a reference to that book, and to the standard colour of that shop, every shop having a different standard colour. The Plaintiff had, while he was in the Defendant's service, made similar entries in the book in question. Having been discharged by the Defendant, he demanded of him the possession of this book, which the Defendant refused to deliver, and for which this action was now brought. The jury found a verdict for the Defendant.

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Shepherd Serjt. now moved for a rule *nisi* to set aside the verdict and have a new trial, upon an affidavit of the Plaintiff, that although so much of the book as was produced at the trial was only of the description stated, that was not the whole of the book which he sought to recover, and that the residue, which was kept back, contained several processes for mixing colours of the Plaintiff's own invention.

HEATH J. As to this ground, it is clear from the evidence that the book was the property of the master, and though there might be inventions of the Plaintiff in it, yet they were the property of the master.

CHAMBERE J. The master has a right to something beside the mere manual labour of the servant in the mixing of the colours; and though the Plaintiff invents them, yet they are to be used for his master's benefit, and he cannot carry on his trade without his book.

Rule refused.

May 8.

GREGORY v. HENDERSON.

Devise to *A.* in trust to permit and suffer the testator's widow to have, hold, use, occupy, possess, and enjoy the full, free, and uninterrupted possession and use of all interests of monies in the funds, and rents and profits arising from the testator's houses, for her natural life, if she should remain unmarried; and that her receipts for all rents, &c., with the approbation of any one of his trustees, should be good and valid, she providing for and educating properly the testator's children, and also paying two annuities thereby bequeathed to *M. D.* and *M. I.* of 20*l.* for their lives, besides board and lodging to *M. I.*, and that his children should be solely under their mother's direction until marriage, or properly provided for: Held that the use was executed in the devise in trust.

THIS was an action of replevin, tried at the *Lewes* Spring assizes 1813, before *Heath J.* *Robert Henderson*, deceased, in 1801 demised the premises by lease to the Plaintiff for 21 years, and devised them by his will; and the sole question was, whether on the true construction of that devise under the statute of uses, the Defendant had the legal estate in her, so as to enable her to make the distress. The testator devised unto his good friends and trustees *William Leader* and *John Mills*, Esquires, his several houses therein described, and also all his monies in the public funds or otherwise, which he should die possessed of, to hold to them his said trustees to and for the intents and purposes thereafter mentioned, viz.: upon trust to permit and suffer his the testator's wife *S. E. Henderson*, the Defendant, to have, hold, use, occupy, possess, and enjoy the full, free, and uninterrupted possession and use of all and singular the interests of the said monies in the funds, or otherwise, and rents and profits arising from the said houses, for and during the term of her natural life, if she should continue his widow and unmarried; and that her receipts for all rents, interests, profits, with the approbation of any one of his said trustees, should be good and valid, she his said wife providing for, and educating properly all the (five) children (therein named) which the testator then had; and also paying *Mrs. M. Danby* thereof of his said estates one annuity of twenty pounds, half-yearly, to whom the testator bequeathed the same during her natural life, and likewise paying to *Miss M. Jones*, besides board and lodging, one other like annuity of twenty pounds, half-yearly, to whom the testator also bequeathed the same; and it was his will that his said children

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children should be solely under their mother's direction until marriage or properly provided for, whereby they could maintain themselves: but in case the Defendant *S. E. Henderson* should marry again, or die, then upon trust that his said trustees should take the management and direction of all the testator's said estates and monies, and after payment of the above-mentioned annuities to *Mrs. Danby* and *Miss Jones* during their natural lives, he directed that the remainder of his rents, profits, interests, and proceeds of his houses and monies, should be disposed of by his trustees for the maintenance of his children, and that the receipts of each child for their own proportion to the trustees, should be a perfect acquittal for the said sum, and this to continue during their natural lives, and at their decease to go to their children lawfully begotten, (in equal portions,) for ever; and that the receipt of the females should still continue to have its full force notwithstanding they were married and termed *femme covert* in law: in case of the death of any of his children without issue lawfully begotten, their proportion or share should be equally divided amongst the survivors; taking care, notwithstanding any thing that might be said above which could be construed to the contrary, that in case of the family's separating, a sufficient sum from the sum total should be taken for *Miss Jones's* board, not less than 50*l. per annum*, besides her annuity; and when she should die, to be buried at the expence of all of them. And the testator appointed *W. Leader* and *J. Mills*, together with the Defendant *S. Henderson*, executors and executrix. If, therefore, the use was executed, *Mrs. Henderson* was the landlord, and the Plaintiff was her tenant. *Heath J.* thought that no doubt a simple devise to trustees to suffer any one to enjoy rents and profits was a use executed in the *cestuy que trust*, unless there is any thing to be done by the trustee: but in this case there were receipts to be approved

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approved and annuities to be paid. He therefore thought that as there was something to be done by the devisee, the use was not executed in the Defendant; and under his direction the jury found a verdict for the Plaintiff.

Shepherd Serjt. now moved to set aside the verdict, and have a new trial. The word trust had no other operation than if he had devised to his trustees "to the uses following." It is ordinary that the trust to permit and suffer *A.* to receive the rents, vests the legal estate in *A.*: *Doe ex dem. Leicester v. Bigg, ante, 2. 109.* The addition that the Defendant's receipt shall be a discharge with the approbation of any one of the trustees, is redundant, and inoperative to restrain the necessary consequence of the legal estate which the testator had before given the Defendant, viz. that her receipt, without such approbation, would be a legal discharge. There are acts to be done by the Defendant. She is to maintain the children, and Miss *Jones*; and is to pay the annuities, which distinguishes this from the class of cases where the trustees themselves are to do the acts. The condition of paying the annuities and maintaining the children raises the inference that the Defendant has the legal estate subject to those charges.

CHAMBER J. In this case the legal estate is in the trustees: to determine that, we must look to the intent of the will; and it seems pretty clear that intent was not to give the Defendant the legal estate. It is true, there is very little left for the trustees to do during her widowhood, but if it was intended that she should have the legal estate, there would have been no need of any trustees at all. The testator making the approbation of the trustees necessary to her receipts, I think, shews it was not intended to give the Defendant a legal estate. I think therefore there is no reason for granting the rule.

GIBBS J. The rule has been misconceived. Though an estate be devised to A. and his heirs to the use of B. and his heirs, the Courts will not hold it to be a use executed, unless it appears by the whole will to be the testator's intent that it should be executed. The Courts will rather say the use is not executed, because the approbation of a trustee is made necessary, than that the approbation of a trustee is not necessary, because the use is executed. The very circumstance which is to discharge the tenants, is the approbation of one of the trustees: "I leave my wife to receive the rents, provided there is always the control of one of the trustees upon her receipts." The testator therefore certainly meant that some control should be exercised, and what could that control be, except they were to exercise it in the character of trustees? I agree therefore that the legal estate is in the trustees, and that the rule ought not to be granted.

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Gibbs J.
Hutcheson.

Rule refused.

GLENNIE and Others, Assignees of the Estate of
G. SHARP and Sons, Bankrupts, v. EDMUNDS.

May 8.

THIS action was brought to recover a total loss on the subscription of the Defendant to a policy effected by, and in the name of the bankrupts, *Sharp and Sons*, whose assignees the Plaintiffs were, on the ship *Neptunus*, at and from *St. Peterburgh* to *London*, at the premium of ten guineas per cent., to return 2l. 10s. per cent. for

An underwriter cannot set off, as a mutual credit, a loss accruing after the bankruptcy of the assured, against premiums of the same and other policies due before

the bankruptcy from the assured, who was himself his own insurance broker in effecting those policies.

Neither can he set off returns of premium upon voyages not complete before the bankruptcy.

Although the underwriter must, upon the conclusion of the adventure, necessarily become debtor to the assured, either for a loss or a return of premium.

Mallic

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Baltic convoy, and 2l. 10s. per cent. more for *North Sea* convoy, and arrival. The cause was tried at the *London* sittings after *Hilary* term 1813, before *Gibbs J.*, upon the following admissions. The bankrupts were the owners of the ship *Neptunus*, and effected the policy above mentioned on that ship,* which policy was on 21st *July* 1812 subscribed by the Defendant for 300l. at a premium of 10 guineas per cent. On the 1st of *October* 1812 a commission of bankrupt issued against the bankrupts, who had been thereunder found and declared bankrupts, and their estate and effects had been legally assigned to the Plaintiffs. The bankrupts at the time of their bankruptcy were indebted to the Defendant in the sum of 600l. 16s. for premiums of insurance for policies by him underwritten to the bankrupts, and including 3l. 10s. for the premium on the policy in question. On the 20th of *August* 1812 the *Neptunus* sailed from *St. Petersburg* on the voyage insured, and during such voyage was on the 11th day of *October* in the same year, captured and wholly lost. On the 30th of *October* the Defendant proved the said sum of 600l. 16s. under the commission as a debt due to him from the bankrupts, but the loss of the ship was not then known to him. The only question to be tried was, whether the Defendant was entitled to have a sufficient or any part of that sum of 600l. 16s. applied and set off against the sum of 300l. for which the Defendant had so subscribed the policy, he thereby offering, on being allowed so to set off, to reduce his proof under the commission by that sum. It was further proved that the nature of the dealings between the bankrupts and the Defendant, was, that the bankrupts acted as their own insurance brokers. When the Defendant subscribed policies for the bankrupts as an underwriter to them, instead of receiving the premium, he suffered them to become items in account, against which were to be placed either losses or returns

a policy should accrue, though it was voidable in
 the hands of the Defendant at any time to call for
 his premiums without waiting for notice of breach.
 The Judge, Sirs., for the Plaintiff, contended that the
 loss is the return of premium in case of ac-
 tual, were at the time of the bankruptcy wholly con-
 tingent debts, dependant on future events, and that they
 therefore could not be set off by the Defendant against
 the debt which he owed to the Plaintiff. Lord
 Mansfield, Sirs., for the Defendant, on the other hand,
 contended, that there had been, within the statute
 5 G. 2. c. 30. s. 28., "mutual credit given by the bank-
 rupt and the Defendant, before the bankruptcy;" and
 that, therefore, "the account was to be stated between
 them, and one debt to be set against the other, and that
 what should appear to be due on either side on the
 balance of account, and on setting such debts against
 one another, and no more, was to be claimed or paid
 on either side respectively." And he referred to the
 case of *Atkinson v. Elliott*, 7 T. R. 386. *Farmer v. Ryan*,
Com. & Bankrupt Law, 5th edn. 554. *Gibbs* J. referred
 to *Ex parte Ockenden*, 1 Atk. 235., and (a) qualification
 pronounced by Lord Mansfield himself, of the doctrine
 he had stated in the case *Ex parte Dyer*, 1 Atk. 220.
 he was of opinion that he could not hold this to be a
 case of mutual credit, without going further than the
 Courts had in any case hitherto gone; and under this
 direction the jury found a verdict for the Plaintiff
 for the full amount of the demand, subject to the ques-
 tion reserved, of the Defendant's right to the set-off.

(a) See *Owen v. Owen*, 1 Atk. 220. and *Owen v. Owen*,
 1 Atk. 220. and the note to the case cited in the last page.

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Accordingly, *Lens*, in *Easter* term 1813, moved for a rule *nisi* to set aside the verdict and have a new trial. He urged that upon this insurance there was an absolute certainty that the Defendant would have to pay something to the bankrupts, either a partial return of premium in case of the ship's arrival, or a loss in case of her capture: the bankrupts had therefore entrusted the Defendant with those sums, the amount only of which was uncertain, and the Defendant had entrusted the bankrupts with the premiums, which constituted a mutual credit. He referred to *Smith v. Hodson*, 4 Term Rep. 211. and *Cox v. Fenn*.

HEATH J. I do not think it is possible to make this a mutual credit; it is only a possible debt, and it would be of no use to grant the rule. I agree perfectly with the case of the pearls, for there the party was accountable for the pearls.

GIBBS J. Since I decided this case I have taken all the pains I could to look into all the authorities on the subject; and if I had found the least ground, I should be very glad to have my decision reviewed by granting a rule *nisi*; but I can find no case which furnishes a principle for it; and therefore it would be useless to grant a rule; and I think the Courts would not be disposed to carry the matter further than they have done. It has been carried quite far enough already.

The rest of the Court concurring, the

Rule was refused.

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PICKERING and Others v. DOWSON and Others.

May 8.

THIS was an action upon the case, for a deceit in the sale of a ship. The Plaintiffs declared, that the Defendants were possessed of a ship called the *Margaret*, and well knowing that she was rotten, ruinous, out of repair, unseaworthy, and in great decay in her timbers, and in a bad state and condition, did, nevertheless, falsely, fraudulently, and deceitfully warrant her to be copper fastened, and to have undergone a thorough repair in the month of *March* then last past, and that she might at that time be sent to sea at a very trifling expence, and that she was then lying in the *London* dock, where she had just discharged a cargo from *Rio de Janeiro* in excellent condition; and did, by means of that false, fraudulent, and deceitful warranty, induce the Plaintiffs to buy of the Defendants the said ship, with divers stores thereto belonging, for the price of 4200*l.*, and did falsely, fraudulently, and deceitfully sell the said ship and stores to the Plaintiffs for that price; whereas in truth, the ship, at the time of the warranty and sale, was not copper fastened, and had not undergone a thorough repair in *March* then last past, and had not discharged a cargo from *Rio de Janeiro* in excellent condition: but, on the contrary thereof, at the time of the sale and making the warranty, was rotten, and in great decay in her timbers, and out of repair, unseaworthy, and in a bad state and condition; and by reason of such the unsound, decayed, and leaky state and condition of the ship in her voyage from *Rio de Janeiro*, her cargo had been and was in the course of that voyage greatly wetted, damaged, spoiled, and destroyed; and so, the Plaintiffs averred, that the Defendants falsely and fraudulently deceived them the Plaintiffs; and they averred a special damage. The second count alleged that the Defendants

If the leading counsel at *nisi prius* takes one line of case, contrary to the opinion of his junior counsel, the Court will not permit the junior counsel to obtain a new trial upon the ground that he was prepared with evidence to support another line of case, which his leader repudiated.

If a representation be made before a sale of the quality of the thing sold, with full opportunity for the purchaser to inspect and examine the truth of the representation, and a contract of sale be afterwards reduced into writing, in which that representation is not embodied, no action for a deceit lies against the vendor on the ground that the article sold is not answerable to that representation.

Whether the vendor knew of the defects,

Or not.

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falsely and deceitfully represented the vessel to be copper-fastened, to have undergone a thorough repair in *March* then last, that she might be then sent to sea at a very trifling expence, and was then lying in the *London* dock, where she had just discharged a cargo from *Rio de Janeiro* in excellent condition; and by such deceitful representation fraudulently and deceitfully sold her to the Plaintiffs: The third count stated that the Defendants, being possessed of the *Margaret*, represented the same matters respecting her, and that the Plaintiffs, relying on that representation, purchased, and they disaffirmed the matters so represented, and averred they were deceived by such representation. The fourth count stated that the Defendants were possessed of a vessel which was rotten, ruinous, and in decay in her timbers, and in a bad condition and unseaworthy, and that they, knowing the premises, fraudulently sold her as and for a ship copper-fastened and in good repair and condition, to the Plaintiffs. The cause was tried at the sittings after *Hilary* term 1813, before *Gibbs J.*: it was proved that the Defendants, in *January* 1809, had purchased the ship *Margaret*, previous to which sale an inventory had been circulated, containing the following description of her: "The remarkably fast sailing ship *Margaret*, foreign built, and free, square stern, figure head, burthen 354 tons register measurement, has two flush decks, copper-fastened and sheathed, was coppered and underwent a thorough repair in Messrs. *Young, Wallis, and Hawkes* dock in *March* last, shifts without ballast, and stows a large cargo, is completely found in sails, cordage, and other stores, and may be sent to sea, at a very trifling expence; has capital heights for the transport service, and is well adapted for the *St. Domingo* or *South American* trade, now lying in the *London* dock, where she has just discharged a cargo from *Rio de Janeiro* in excellent condition: Height in the hold 12 feet; between decks 11 feet; length 128 feet; breadth 27 feet 7 inches; hull,

hulls, masts, yards, standing and running rigging, with all faults, as they now lie, anchors, &c. The vessel and her stores to be taken with all faults, as they now lie, without any allowance for weight, length, quality, or any other defect whatever." When the Defendants purchased the vessel, a copy of these particulars was delivered to them by the vendor. The Defendants were preparing the vessel to go on a voyage to *Demarara*, had appointed a captain, and posted the vessel at *Lloyd's* for freight, when the Plaintiffs applied to them to sell her; the Defendants answered that they would sell her if the Plaintiffs would give a competent price; in the course of the negotiation, the Defendants permitted the Plaintiffs to inspect the state of repair of the vessel, which was then lying in a dock to receive repairs for the Defendants' intended voyage, and the Plaintiffs actually examined her. The Defendants also permitted them to see the inventory by which they had themselves bought her, as before mentioned. At length the parties signed an agreement, the material parts of which were as follow: "*January 20, 1809. W. D. Dowson, agent for W. T. Wood, sells, and Mr. Pickering, for account of Mess. Blades, of Hull, buys the ship called the Margaret, foreign built, of the measurement of 354 tons, or thereabouts, now lying in the London dock, for the sum of four thousand two hundred pounds. On payment, the ship, with what belongs to her, shall be delivered according to the inventory which has been exhibited, but the said inventory shall be made good as to quantity only. The ship and stores shall be taken with all faults, in the condition they now lie, without any allowance for weights, lengths, qualities, or any defects whatever.*" On the 17th of *February* following the parties executed bills of sale, and completed the purchase. For the Defendants it was proved, that the ship was not copper-fastened, that the Defendants knew the same

re-
lating
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leaky, that the Defendants had, after their purchase, offered her to government to be employed in the transport service, and that the agents of government had rejected her. The Plaintiffs made no complaint until after they had sent the vessel to sea on a voyage to *South America*, in the course of which she became leaky, and was obliged to put into *Lisbon* to refit, after which she proceeded on her voyage, and again proving leaky, she returned to *Lisbon*, was surveyed, and condemned as incapable of the voyage, sold by auction, and broken up. *Gibbs J.* was of opinion that the Defendants were not in law liable in this action, and directed a nonsuit.

Best and *Marshall*, Serjts., in this term moved for a rule nisi to set aside the nonsuit and have a new trial. They contended that the whole inventory of the former sale was delivered by the Defendants to the Plaintiffs as a representation of the state of the ship which existed at the time of the sale to the Plaintiffs, and that the contract for the purchase being founded on that representation, and the representation having failed, with the knowledge of the Defendants, that when they made it, it was untrue, the Plaintiffs were entitled to recover. The stipulations in the contract that the ship and stores should be taken with all faults, without any allowance for weight, length, quality, or any other defect whatsoever, did not enable a seller to make with impunity a representation of facts which he knew to be false, or did not know to be true. In the case of *Parkinson v. Lee*, 2 *East*, 323., which would be cited for the Defendants, *Lawrence J.* relied on the circumstance that there was no representation made by the Defendant to the Plaintiff as to the goodness of the hops, to induce him to make the purchase. Here was a representation of facts, which were most important, and proved false. The ship was not copper-fastened; she had not then lately undergone a thorough repair, nor had she delivered her last

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last cargo, as represented, in excellent condition, but, to the knowledge of one of the Defendants, was leaky, and when she went to sea, she was found rotten. In the case of *Mellish v. Motteux*, *Peake's N. P. Cas.* 115., Lord *Kenyon* C. J. says, "with all faults" means with all faults unknown to the Plaintiff. And that is the true construction. In *Baglehole v. Walters*, 3 *Campb.* 154. Lord *Ellenborough* C. J. certainly does not agree to that, but in the last case there was no representation. Lord *Ellenborough* thought that where an article is sold with all faults, how many of them are known to the seller is immaterial. But where a ship is sold with all faults, and arts are used to put a purchaser off his guard, which is the case here, where representations were made that induced the Plaintiffs to believe this was a perfectly safe ship to be sent to sea, the same doctrine does not hold. *Marshall* also relied on the circumstance that at the trial he had offered to call the surveyor employed by government when this ship had been tendered to the transport board, who directed a survey, and that he would have proved that a part of the ceiling being taken down in presence of one of the Defendants, the ship's beams were found rotten. [*Gibbs* J. My Brother *Best*, who led the cause, used his discretion at the trial, and did not go on this line of case; if the counsel who leads the cause takes one line, and the judge and jury decide on the line taken by the leader, the junior counsel also must confine himself to the line taken by the leader: this matter was stated, and I repeatedly called for evidence of this sort, and, under the direction of the leader, none such was produced.] It is supposed there is great magic in the words "all faults," that does not mean all frauds. Even the misrepresentation that the ship was copper-fastened, would avoid the contract. This was like the case of representations in insurances. Lord *Kenyon's* decision in *Mellish v. Motteux* is supported by very great authorities of the civil law, to which the

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common lawyers in doubtful cases refer. *Digest, lib. 4. (a) tit. 3. f. 2. De dolo malo. Dolum malum a se abesse præstare venditor debet, qui non tantum in illo est qui dissimulat, sed et in illo qui fallendi causâ insidians et obscure loquitur.* Before the decision of that great Judge Lord *Kenyon* is laid aside; it ought to undergo the solemn consideration of at least one Court.

HEATH J. If I could harbour any doubt on the question, I would grant a rule *nisi*. The Defendant had recently purchased a ship, and intended to send her to the *West Indies*. The Plaintiff applies to him to sell the ship, the Defendant states to him, "Here is what I bought it for from the former vendor;" he sells it him by a contract containing no representation whatsoever. It is in vain to reduce a contract to writing, if you may afterwards refer to all that has passed by parol. The meaning of selling "with all faults," is, that the purchaser shall make use of his eyes and understanding to discover what faults there are; I admit the vendor is not to make use of any fraud or practice to conceal faults; I think the representation is none; it is the mere delivering over of a paper which the Defendants received from the former vendor. With respect to the doctrine, I adhere to that of Lord *Ellenborough* in *Baglibole v. Walters*, without any difficulty. I subscribe to the doctrine of the *Digest*, but this is not an obscure or insidious contract, but plain and simple.

CHAMBER J. I am of the same opinion. When there is a written agreement, and no difficulty as to the meaning, it is dangerous to depart from it without evidence of fraud. Where there is such, the Courts of law will interfere: here I see none. That the Defendants did not know the faults is manifest from the use they

(a) The Defendants did not succeed in verifying this reference.

meant

meant to make of the vessel. They deliver over all the papers. The party, after an inspection, agrees to purchase it with all its faults. There is no evidence of any fraud at all; and under such circumstances, after examination had, and a contract made in writing, which is made to bind the parties, it cannot be permitted that because the state of it turns out to be different from what was expected, the whole shall at a future time be rescinded. It would put an end to all contracts.

GIBBS J. Lord *Kenyon* certainly did, in the case of *Mellish v. Motteux*, receive some such evidence as that which has now been referred to; but that case has since been expressly over-ruled in a subsequent *nisi prius* case in *Campbell*; and that decision has never been questioned at the bar. The ground on which that case ultimately went, was, that the one party covered the defects so that the other could not see them; but the evidence did not support the suggestion; and I remember the case of the sale of a house in *South Audley Square*, where the feller being conscious of a defect in a main wall, plastered it up, and papered it over; and it was held that as the vendor had expressly concealed it, the purchaser might recover; but in this case the Plaintiffs did not in their opening state any concealment. This is a case regarding property of considerable value, but that is no reason for interfering to put the parties to further expence, unless there is a rational ground of doubt. What are the facts of this case? the Plaintiffs had very recently purchased this ship under an inventory delivered to them, at the head of which was a representation from those of whom they purchased. They were about to send this ship to the *West Indies*, and had actually appointed a captain. The Plaintiffs apply to them, to know if they will sell their ship; the answer is, Yes, if we get our price. The Plaintiffs and several others are permitted to go and examine the ship throughly. After this,

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this, the old inventory is handed over, in which they see how the former vendors described her, but the Defendants do not repeat that as their present representation of her, and the parties have full liberty to examine her. They then come to an understanding, and reduce the contract to writing. By that alone they are afterwards to be bound, unless some fraud can be shewn. Even if there had been a representation, it would not have availed. I hold, that if a man brings me a horse, and makes any representation whatever of his quality and soundness, and afterwards we agree in writing for the purchase of the horse, that shews and confirms the representations; and whatever terms are not contained in the contract, do not bind the seller, and must be struck out of the case. In this case, if there had been any fraud, I agree it would not have been done away by the contract; but in this case there is no evidence of any fraud at all. The ship is afterwards conveyed by a bill of sale: that contains no warranty. I thought at the trial, and still think, that the parties were not now at liberty to shew any representation made by the feller, unless they could shew that by some fraud the Defendants prevented the Plaintiffs from discovering a fault which they knew to exist. I think, on these grounds, the Court must refuse the motion; but I go further, and think, that as to the evidence of the representation, and as affecting the conduct of the Defendants, the Defendants only handed over the inventory for the sake of the Plaintiffs' seeing the several articles which were to be sold with the ship; and not even with a view to shew them what had been the representation made to themselves. That, however, was not the ground on which I went at *nisi prius*, where I proceeded upon the ground that after the written contract was made, parol evidence could not be admitted of former representations, unless there were proof of such fraud as I have described.

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HODGSON v. FULLARTON.

May 10.

THE Plaintiff declared that in consideration that he had caused to be delivered to the Defendant certain casks of dollars to be carried on a voyage from the river *La Platte* to *London*, upon freight for certain hire and reward, the Defendant undertook to take care of them; and assigned for breach that he took so little care of them that they were lost. The cause was tried at *Guildhall*, at the sittings after *Michaelmas* Term 1812, before *Mansfield* C. J., when the evidence was, that a licence had been obtained from the *South Sea Company*, which had been since destroyed, and the entries in their books, (admitted in evidence after argument, as the declaration of the company against themselves, without examination of the secretary who made the entries, and who was prevented by illness from attending,) denoted that it was a licence to the ship *Braganza*, for 18 months, from *February* 1809, with liberty and authority to and for the said ship, to sail, trade, navigate, and adventure to all and every port or ports, land, &c. within the company's limits. It was proved that the *Braganza* sailed with an outward cargo, and that after a sale thereof at *Buenos Ayres*, the proceeds in dollars were put on board his Majesty's gun-brig the *Cheerly*, whereof the Defendant was then Commander, in 21 casks, to be brought to *England*, for which the usual freight of two and a half *per cent.* was to be paid. Two of the casks, containing 5865 dollars, of the value of 1407*l.* 6*s.* 4*d.* failed, upon the arrival of the *Cheerly*, to be delivered, having been plundered by the crew, to recover which sum this action was brought. For the Defendant it was objected, that the dollars were merchandize, and the bringing them home was an illegal transaction,

An action lies against the commander of a ship of war who takes the bullion of a private merchant on board, for not safely keeping and delivering it.

It is no infraction of the monopoly of the *South Sea Company* to send home from the *South Seas* in a ship of war, dollars the proceeds of an adventure to *South America*, sent out in another ship named and licensed by the Company.

The entry in the *South Sea Company's* books of the minutes of a licence granted by them, is admissible in evidence, as being a declaration adverse to their interest, without calling as a witness the officer who made the entry.

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transaction, as being an infringement of the *South Sea Company's* monopoly, and not being protected by the licence to the *Braganza*, and the *South Sea Company* having granted no licence to the *Cheerly*. For the Plaintiff, it was contended, first, that no licence was necessary for remitting home the proceeds of an outward cargo; secondly, that if it were, the licence to the *Braganza* virtually protected the remittance of the proceeds in the ordinary mode of remitting bullion, namely, on board a King's ship. *Mansfield C. J.* thought he could not distinguish between the case of a remittance home of bullion, and a sending home of the proceeds invested in any other merchandize, which last would clearly be illegal; but permitted a verdict to pass for the Plaintiff, for 1407*l.* reserving the point.

In the following term, a rule having been obtained to enter a nonsuit,

Shepherd and *Lens Serjts.* now shewed cause. They admitted that since the monopoly of gold and silver, the produce of *America*, is by the statute 9 *Ann. c. 21. s. 58.* granted to the *South Sea Company*, it resulted that if the *Cheerly* had been a merchant-ship, and the *Braganza*, had not been licensed, the transaction would have been illegal, and within the prohibition of *s. 47.*, and the forfeitures of *s. 48.* But the *Cheerly* being a King's ship, and lawfully being at *Buenos Ayres* on public service, needed no licence from the *South Sea Company*: she was lawfully about to come home, and it is legal for King's ships to carry bullion, though all other merchandize is prohibited to them. If the *Braganza* had been lost, it was clear that her cargo might have been forwarded by another vessel, and would still have been protected by the licence. It was equally legal for the Plaintiff to send home his proceeds by the *Cheerly*. In practice, no license had ever yet been obtained

tained or applied for from the company for remitting home the proceeds of merchandize sent out to *South America*. It is a necessary incident and consequence of licencing the traffic, that the proceeds may be lawfully remitted home in the usual course, otherwife when the trading adventure was engaged, the merchant would be incapacitated from reaping the fruits of it. The practice of sending home the remittances for cargoes of private merchants in King's ships had been universal, and if any doubt were now to be thrown on the legality, it would be necessary that an act of parliament should pass for the indemnity of all who had been concerned therein. The legality of the practice was apparent by the act establishing the monopoly, for the illegality of interloping is no otherwise declared than by the 49th section, which imposes forfeiture of the ships employed; and as this section cannot extend to the vessels of his Majesty, because he is not expressly named therein, it follows that his vessels may legally bring home these dollars. [*Per Curiam*, though the King's vessel would not be forfeited, the contracts of the subject for bringing home goods or merchandizes in a King's ship would be illegal.] It is immaterial whether the remittance be made in bills of exchange, or in the coin of this country, or in dollars, which are the coin of the country where the licenced cargo is sold. They are not shipped for *England* as a mode of trade, but as a mode of remittance to which the prohibition is not to be extended. *Toulmin v. Anderson*, ante, 1. 227. is irrelevant.

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Best and Vaughan Serjts. contra. If an application be made to the company for a licence to a King's ship, to bring home dollars, it will be granted; and if the vessel be unknown, a licence will be granted to bring home dollars in ship or ships. This contract

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is void, as being an infraction of the company's rights. The Defendant does no illegal act. The act of the Plaintiff is illegal, he is the merchant who puts these dollars "on board with intent to trade or adventure from parts within the limits" of the *South Seas*: it is he therefore who is incapacitated from enforcing his contract, for this is a trading from the *South Seas*. It is prohibited by the same section to "hire or freight any ship" from thence: it is true that the Plaintiff has not hired a whole ship on freight, but he has put the goods on board on freight. It is said this is not a trading, because dollars are the current coin of that country; but the current coin of no country, except of our own, is taken as coin, but as merchandize. These dollars are taken by weight, estimating the price of the silver: they do not derive their value from the impression they bear of the royal arms of *Spain*. This is not, as is said, like sending home bills of exchange: a person who had stolen bills, could not, at common law, be indicted for stealing goods and merchandizes; and a special statute was necessary to enable him to be indicted for it; but one might be indicted at the common law for stealing dollars as merchandize. *Mansfield* C. J. held there was no difference between sending home a return cargo in dollars or in any other merchandize. The question, therefore, is, whether this trading is covered by the licence obtained. That licence is confined to the ship *Braganza*, and protecting the ship *Braganza* for a limited time, it necessarily protected, during that time, whatever was on board her, but, being so restricted, it cannot be extended to goods sent by any other ship: by the construction now contended for, it is to protect all on board her, and all returns sent home by any other ship at the same time. It is said the *Cheerly* is legally in the *South Seas*, but though that is true, she cannot be therefore legally used for

for purposes of commerce. The act of parliament which authorizes ships of war to carry bullion, did not mean to break in upon the rights of the *South Sea Company*. The Plaintiff also makes out a regular bill of lading; and two and a half *per cent.* is paid for putting the dollars on board; that is a *traffic*, and is as much an adventure in goods and merchandizes as any other article; and it can make no difference whether they were bought with the proceeds of another adventure, or are an original adventure. The Plaintiff, therefore, cannot recover.

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HEATH J. In this statute, 9 *Ann. c. 21. s. 49.*, the legislature have guarded against a literal construction, by saying, "contrary to the true meaning of this act." What is the true meaning? To give a monopoly to the *South Sea Company*. Whatever, then, is not against that Company's monopoly, is not against that statute. The putting this bullion on board the sloop of war is not against the Company's monopoly. It is said that the *Braganza* might cover several cargoes, but it is a licence for time; and as many adventures as the ship might make within that time, would be legal; no fraud or improper practice is suggested here.

CHAMBER J. I am of the same opinion. This is neither against the words nor the policy of the act.

GIBBS J. read over the 49th section, and declared his entire concurrence. With respect to trading and frequenting these parts, the persons trading had a licence so to do; and with respect to the sailing and being there, his majesty's ship was legally there. The words are, "if any subject shall lade or put on board any ship or ships any goods or merchandizes with intent to trade or adventure unto or from the *South Sea*:" the *Braganza's* adventure had terminated: the trading was ended,

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ended, and the proceeds had been turned into the current coin of that country, *Portugal*. It is true, when the dollars got home, they would become merchandize; but this was not a trading adventure from thence, but that trading was ended. As for bringing home the bullion in his majesty's ship *Cheerly*, it was only doing that which the vessel lawfully might do. The rule, therefore, must be

Discharged.

May 11.

PIESCHELL v. ALLNUTT.

Same v. LAVIE.

If a vessel brings, under a licence, a cargo of enumerated goods from an hostile country hither, and also certain other goods not licensed, the insurance on the licensed goods is not thereby vitiated.

In 1810, it was lawful for a *Hamburgher* to bring goods to this country from a hostile port under strict blockade.

THESE were actions upon policies of insurance, dated the 16th of November 1810, the one upon the ship *Goed Pest*, the other upon her cargo, at and from the *Elbe* to *London*. Upon the trial of the cause at *Guildhall*, at the sittings after *Michaelmas* Term 1812, before *Mansfield* C. J., it was proved that the vessel was a *Hamburgher*, and sailed from *Gluckstadt* on the *Ems*, after a licence granted by the King in council to Messrs. *Cassendyck* and *Hentz*, on behalf of themselves and others, and permitting a vessel bearing any flag, to import a cargo of corn and many other enumerated commodities, (not including books,) "and no other articles whatever." There were put on board several cases of books, not the property of the assured, nor covered by the policy, but on account of *Mackdonald*, a *London* bookseller, the freight whereof amounted to 43*l*, being about one-seventh part of the freight of all the goods on board, which together amounted to 300*l*. The ship was lost on the voyage to *London*. For the Defendant, it was objected, that the importation of the books was illegal, unless licensed, and that no licence, having

having been obtained which included them, the defect vitiated the whole adventure, and rendered the vessel and cargo liable to confiscation, and that the insurance was therefore void; and upon this ground the Chief Justice nonsuited the Plaintiff, with liberty to move to enter a verdict for the amount ~~of~~ the Defendant's subscription.

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Shepherd Serjt. in *Hilary* term 1813, accordingly obtained a rule ~~nisi~~, upon two grounds: first, that no licence was necessary to enable this vessel, being a *Hamburgher*, a neutral, to perform the voyage insured, secondly, that admitting the adventure of the books to have been illegal, that circumstance did not invalidate the Plaintiff's insurance.

Best and *Vaughan* Serjt. in this term shewed cause against the rule. 1. The consignment of the books was a trading by the consignee, a *British* subject, with an enemy, and from an hostile port, which is illegal, unless legitimated by licence, although it be carried on, as here, by means of a neutral ship. Though the books were not the property of *Rouge*, in whom the interest was averred, nor were they intended to be covered by this policy, yet the having on board this illegal consignment, vitiated the whole adventure. It is illegal for a neutral without a licence to bring any goods hither from an enemy's country to a subject of this country. If the vessel had been taken on this voyage by an *English* cruiser, the vessel and the entire cargo would equally have been condemned by the court of admiralty. The *English* orders in council recognize the illegality of this adventure. That of 8th *April* 1806, declares the entrance of the *Ems*, *Weser*, *Elbe*, and *Drave* to be blockaded. The order of the 4th of *February* 1807, prohibits the interrupting of neutral vessels with cargoes of certain enumerated goods, pro-

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vided they are not coming from any port in a state of strict and rigorous blockade. An order of 3rd May 1809 declares that the order of 4th of February 1807 shall still continue in force, except as to any ship or goods coming from ports or places under actual blockade; and this ship coming from *Gluckstadt*, a town on the *Eme*, which, by the order of 6th April 1806, is strictly blockaded, comes within the exception; and this vessel having on board goods not included in the enumeration contained in the order of 4th February 1807, is not within the relaxation given by that order. The order of 18th February 1807 permitting vessels and goods from *Hamburgh*, *Bremen*, and other places in the north of *Germany* to pass unmolested, which vessels and goods shall be employed in a trade to and from the United Kingdom, notwithstanding the said countries are or may be in the possession, or under the controul of *France*, will be relied on; but it is inapplicable. This is not a voyage from *Hamburgh*, but a voyage by a *Hamburgher* from *Gluckstadt* to *Great Britain*: the intention of that order was to licence a trade direct from *Hamburgh* to *Great Britain*, but the order shews, that unless it had been issued, *Hamburgh* must have been considered as an hostile port. The order of 17th June 1817 permitting certain goods belonging to *Hamburghers*, which had been seized, to go to neutral ports, and declaring that vessels in future should not be liable to capture, provided they were engaged in a trade to any part of this kingdom, intends a trade direct from the country to which the ship belongs, to a port of this kingdom. The order of 3rd May 1809 is, however, long subsequent in date to the others, and therefore rescinds them. But putting the orders in council out of the case, this was from the beginning an illegal voyage. The books were purchased *flagrante bello* from the enemies of this country:

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Shepherd and *Lens* Serjts. in support of the rule. Even if the order of 3rd *May* 1809 repeals the relaxation of the order of 8th *April* 1806, which is contained in the orders of 4th *February* 1807, and 18th *February* 1807, it is not therefore to be assumed that it again sets up the order of 8th *April* 1806 in like manner as if that had never been relaxed; for it leaves the order of 17th *June* 1807 untouched, on which the Plaintiff principally relies, and which was made for the express purpose of protecting the inhabitants of *Hamburg* and *Bremen*. Another order in Council of 11th *November* 1807, unless it be virtually repealed by the order of 3d *May* 1809, declares, that the prohibition shall not extend to any vessel of any country not at war with his Majesty, which ship shall be coming from any port or place in *Europe*, declared by that order to be subject to the restrictions incident to a state of blockade, destined to some port or place in *Europe* belonging to his Majesty, and which shall be on her voyage direct thereto. In the case of *Goede Hoop*. *Edw. Leading Decisions*. 10. Sir *W. Scott* adjudged the release of a vessel and her cargo of brandy which had failed under an expired license, and condemned other goods alone, which were found on board the same ship and were not comprehended in the licence. And in the case of the *Jouge Clara*, *Lead. Dec.* 48. non-enumerated goods were condemned, and the licensed goods and ship were released, and Sir *W. Scott* says, "It would fall extremely hard upon the commercial interests of the country, if the innocent goods of one merchant should be confiscated on account of the misconduct of another. Such a position would carry the doctrine of infection beyond what is done even in cases of contraband, where the penalty attaches only to the property of the same owner." No authority is cited that a neutral who has a right to trade with an enemy's port, and to bring hither the

1813. cargo he has there purchased, acts illegally in bringing
 PIESCHELL. hither from that port the goods of a *British* subject.
 The bringing of these books is not a trading with the
 ALLNUTT. enemy by any subject of this country, otherwise than by
 the intervention of neutrals; and, if that is prohibited,
 no neutral trade at all can be carried on, for the neutral
 must communicate with the natives of each hostile
 country. In the case of *Bell v. Potts, Buller J.* held
 that an *English* subject might ship his goods from an
 enemy's port after war had been declared, and both his
 ship and his innocent goods were restored.

HEATH J. It is very clear that the order in council
 of the 3rd of *May* 1809, does not repeal the two former
 orders in favour of *Hamburg* ships. The party does
 not here rely upon the order in council of the 4th
February 1807, but on those of 18th *February* and 17th
June 1807. As to the other point, the only conse-
 quence of bringing these goods is that they liable to be
 seized.

CHAMBERE J. I am of the same opinion. It is quite
 clear.

GIBBS J. Giving the Defendant the full benefit of
 all his arguments, there is not the least doubt in this
 case. In the court of Admiralty if the ship, goods,
 and books had been libelled, the books would have been
 condemned, and the ship and other goods would have
 been restored; and if they ought to be restored, I can
 find no ground why they should not be insured. I am
 further of opinion that this adventure required no li-
 cence; it not being within the operation of the order
 of 6th *April* 1806, that being relaxed by the subsequent
 order alluded to; and I am further of opinion that the
 circum-

circumstance of the books being on board, which belonged to *Mackinlay* the bookseller, does not render the whole of the adventure illegal, nor the insurance void.

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Rule discharged.(a).

(a) See *Hagedorn v. Bell*, 1 *Maule & Selw.* 450.

OSBORNE v. DAVIS..

May 11.

BEST Serjt. had obtained a rule nisi to set aside a warrant of attorney to confess judgment, given by the Defendant while he was in custody, upon the ground that his attorney was not present. *Lens* Serjt. shewed cause, and *Best* endeavoured to sustain his rule. The Court held it a sufficient compliance with the rule of Court, *Hilary* 14 & 15 *Car.* 2., which requires that an attorney for the Defendant must be present when a Defendant in custody gives a warrant of attorney to acknowledge a judgment; that an attorney was present, who was a total stranger to the Defendant, and who was called in by the Plaintiff's attorney, the Defendant having previously expressed a wish to have his own attorney present, who lived in *Compton-street*, but the Plaintiff's attorney having come from *Piccadilly* to the inns of court to settle the matter, having objected to the delay requisite to send for him: and the Court said, it would be very mischievous, and prevent much accommodation to prisoners, if this were not sufficient.

A warrant of attorney confessed by a Defendant in custody is good, if an attorney on his behalf is present, though he is a total stranger to the Defendant, and is introduced by the Plaintiff's attorney, who refused to remain on the spot a sufficient time for the Defendant to procure the attendance of his own attorney, who lived in a distant part of the town.

Rule discharged without Costs.

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May 11.

DAWNEY, Demandant; NEWSOME, Tenant; Lord
Viscount DOWNE, Vouchee.

Where the deed to make the tenant to the precept is lost, a recovery is not to be amended by an attested copy of that deed,

Nor by an office copy of the enrolment of a deed.

But it may be amended by the enrolment itself, being brought into court.

LENS Serjt. moved, on a former day, to amend this recovery, suffered in 1748, by the insertion of the manor of *Rimswell* in the county of *York*, and the tithes of the parish of *Rimswell*, which had been omitted, upon an affidavit of Lord *Downe* that by a bargain and sale, enrolled in 1748, all his property, including this manor, and tithes, and all other hereditaments wherein Lord *Downe* had any estate of inheritance, were conveyed to *Newsome* for the purpose of suffering this recovery; that this manor and tithes were at that time in the seisin of Lord *Downe*, and were intended to pass. That the bargain and sale itself could not be found, and his lordship believed he had never possessed it, but that he had found among his muniments an attested copy thereof, which supported this statement.

Per Curiam. The Court has gone very far indeed in amending recoveries; it is going a great way to let the oath of a tenant in tail prejudice the issue in tail in any case: but we have never gone so far as this. The question is not whether this copy would be admissible in evidence on a trial, but whether upon this warrant the Court can take upon themselves, without hearing the issue, to bar them of their inheritance upon motion.

Upon this day *Lens* made the like motion upon an office copy of the enrolment of the bargain and sale. The officer, in reading it, read the word as *Rimswell*, and such, on inspection of the copy by the Court, it appeared to be; the Court again rejected the application, remark-

remarking on this, as an additional proof of the necessity of their observing extreme caution and circumspection in the amendment of recoveries, and directed the enrolment itself to be produced, as being better evidence, and more analogous to the production of the deeds themselves, which their general practice required.

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DAWNEY,
Demandant.

Accordingly, on a subsequent day *Lens* renewed his motion, when, the roll being in court, and it plainly appearing by the record to be *Rimsfuell*, and not *Runfuell*, in three principal places where it occurred, although the word was plainly *Runfuell* in another part, and it being sworn there was such a place as *Rimsfuell*, and no such place as *Runfuell*, in the county of *York*, and the general words passing all other manors and lands of Lord *Dorset* in that county, the Court permitted the amendment.

LOVELL v. MARTIN and Another.

May 12.

THE Plaintiff being possessed of a bill drawn by *T. White*, at *Portsmouth*, on the 7th of July 1810, at six months after date, on *Smith, Atkins, and Co.* in favour of the Plaintiff, or his order, and accepted with this direction, "with Messrs. *Martin, Stone, and Martin*," indicating that the bill would be paid at their house in *London*, indorsed it, and casually lost it. On the 4th of *August* he wrote to *Smith, Atkins, and Co.*, stating the circumstance, and *Smith, Atkins, and Co.*, in consequence applied to the Defendants, requesting that they would not pay or discount the bill if offered: on the 7th the Defendants wrote back to the Plaintiff, that there was little chance of the bill being offered for dis-

A banker, after notice, discounts a bill drawn on a customer, and by the acceptance made payable at his bank, after it has been lost by the holder, and afterwards debits his customer with the amount of the bill, writes a discharge on it and delivers it up to the customer as the banker's voucher of his account.

Held that the banker is thereby guilty of a conversion, and the loser of the bill may recover in trover without a previous demand of the bill.

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count, but if not recovered, care should be taken that it should not be paid when due, of which they requested that he would remind them. On the 2nd of *January* 1811, the Plaintiff wrote to remind the Defendants that the bill would soon fall due, *viz.* on the 10th of *January*; to which they answered, that they had long since discounted it for *Powell*, a bill broker, who was their customer. The bill had in fact been picked up by a child, from whom *Powell* had it; the Defendants discounted it for him, and at maturity charged the account of *Smith*, and *Atkins*, with the payment of the bill, noted it, wrote a discharge on the back of the bill, and delivered it up to *Smith*, *Atkins*, and Co. as a voucher of their account. The Plaintiff, without further communication, brought this action. His declaration contained two special counts in tort, alleging that the bill was stolen by persons unknown, and charging the Defendants with having prevented the Plaintiff from recovering it, and a count in trover. Upon the trial of the cause at the sittings after *Trinity* term 1812, before *Mansfield* C. J. it appearing that the two first counts incorrectly described the transaction, the Plaintiff resorted to the last: *Lens* Serjt., for the Defendants, objected that a previous demand of the bill, and refusal to deliver it, was necessary as evidence of a conversion; but the Plaintiff on that count obtained a verdict.

Lens, in *Michaelmas* term 1812, obtained a rule nisi to set aside the verdict and enter a nonsuit.

Shepherd and *Best* Serjts. in this term shewed cause against the rule. They urged that the Defendants had been guilty of a complete conversion of the bill, having appropriated it to their own use by debiting *Smith*, *Atkins*, and Co. with the amount, after they had discounted it, and delivering up the bill to *Smith*, *Atkins*, and

Co.

Co. The case was the same as if the Defendants had carried the bill to *Smith, Atkins*, and Co., and received the amount from them. They took a bill belonging to the Plaintiff, and gave it up to another, under such circumstances, that they could not possibly get it back again. This was a conversion.

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Lens and *Vaughan* Serjts., *contra*. If the Plaintiff was entitled to the bill, he should have demanded it. There was neither demand nor refusal. The Plaintiff neither shews an absolute destruction of the subject matter; nor such an alteration of it as to prevent his having it in the same plight as before. If the Plaintiff has a right to the bill, he may, upon obtaining possession thereof, still sue on it. But it was incumbent on the Plaintiff to shew that *Powell*, who was apparently the indorsee, had not a good title to the proceeds of the bill by affecting him with notice of the loss or theft: for it is possible that *Powell* took it without that notice: the noting was a perfectly nugatory act.

HEATH J. Under the circumstances of this case, the count in trover may be maintained. The Defendants have improperly discounted the bill: they have sent it to *Smith* and *Atkins*, as their voucher.

CHAMBERE J. I am of the same opinion. I think there is complete evidence of a conversion. The doctrine of the Defendants' counsel applies to detain, not to trover; where the circumstances amount to a complete conversion, there is no need of a demand. The discounting the bill, and applying it to the Defendant's own use, is a purchase of the bill by the Defendants, after notice of the Plaintiff's title: but not only that; they have made use of it as a discounted bill. The writing a receipt on it was a further act of conversion.

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GIBBS J. Suppose this bill had not been payable at the bankers, that *Lovell* had lost it, and that the finder, knowing *Lovell* had lost it, had carried it to *Smith* and *Atkins*, and had it paid! It is clear that the finder would have been liable in trover to the Plaintiff. Then how does this differ? *Martin* and *Stone*, most respectable persons, having notice the bill belonged to the Plaintiff, and was lost, take it by mistake, discount it, and thereby become the purchasers of it. Then, casually being the bankers of *Smith* and *Atkins*, and having through the medium of their account with them received the money for it, and written a receipt on the back of it, they send it to *Smith* and *Atkins* as a voucher to their customer. That is the same thing as if they had carried it to *Smith* and *Atkins* to be paid, and had obtained payment for it, knowing it was a lost bill. It appears to me a complete conversion. It is admitted they must lose this money at all events, and whether the Plaintiff recovers it or not, is not, therefore, material to them; it is certainly a very hard case.

Rule discharged!

May 12.

COOPER and Another v. SOUTH, BRIGGS, SMITH,
BANKS, WATSON, and RUDER.

The certificate of a ship's registry is not evidence to charge as owners any of the persons therein named as such, other than those who have joined in the affidavit on which the the registry is obtained.

THIS was an action in tort against the owners of a brig, for so unskillfully navigating her that she ran down the Plaintiff's boat. Upon the trial of the cause at the sittings after Trinity Term 1812, before *Mansfield* C. J. the evidence of ownership to charge the Defendants was the certificate of the brig's registration, alleging all the six defendants to be owners, but obtained upon the affidavits of *South* and *Briggs* only.

In an action in tort against six, the Plaintiff may recover a verdict against two.

After verdict for the Plaintiff, *Vaughan* Serjt. had in *Michaelmas* Term last obtained a rule nisi for a new trial upon two grounds: 1. that the allegation of the mode in which the damage was occasioned was not well proved; 2. that the certificate obtained on the affidavit of two owners was not sufficient to charge the rest, wherefore he concluded there must be a nonsuit as against all of them.

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SOUTH.

Best Serjt. now shewed cause, and *Vaughan* and *Pell* Serjts. endeavoured to support his rule. Upon the first point the Court held the verdict well supported by the evidence, which it is immaterial to state. Upon the second question the Court held that this case could not be distinguished in principle from that of *Tinkler v. Walpole*, 14 *East*, 226. assumpsit for goods sold, from which it only differed because this was in tort: but the objection derived therefrom extended only to certain of the Defendants, and that the verdict was proper in all respects, except as to the parties, and might well stand as to those two on whose affidavit the certificate was founded; and with this qualification, they

Discharged the rule.

GOLDSMID and Others v. GILLIES.

May 12.

THIS was an action upon a policy of insurance upon 56 casks of coffee, valued at 3000*l.*, shipped on board the *Margaretha*, on a voyage at and from *London* to *Tonningen*. The policy was underwritten by the Defendant to retain from the proceeds the amount of his acceptances; the assured not having abandoned, the loss became partial only, and the assured was entitled to recover from the underwriter a sum bearing the same proportion to his subscription as the loss ultimately sustained bore to the whole value in the policy.

A cargo insured by a valued policy was confiscated and sold; but the enemy permitted the foreign con-

fendant

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Defendant for 200*l.*; 40*l.* was paid into court. The cause was tried before *Mansfield C. J.*, at the sittings after *Trinity* term 1812, at *Guildhall*, when a verdict was found for the Plaintiffs for 44*l.* 16*s.*, exclusive of the 40*l.* paid into court, subject to the opinion of the Court upon the following case.

The Plaintiffs, having obtained a licence from the *British* government for the voyage, shipped the coffee at *London*, upon their own account, on board the *Margaretha*, and consigned it to Messrs. *Baur*, their agent at *Tonningen*, to sell upon commission. Upon the credit of this consignment the Plaintiffs had drawn bills to the amount of 31,761 marks *banco*, or 2400*l.*, upon Messrs. *Baur*, which they accepted, and, at maturity, duly paid. Immediately upon the arrival of the vessel at *Tonningen*, and before any part of the coffee was landed, it was seized by the *Danish* government, and afterwards confiscated. The government ordered the coffee to be sold by Mess. *Baur*, and compelled them to give security to account for the proceeds. A sale was soon afterwards effected, the gross proceeds of which amounted to 69,139 marks *banco*, and the net proceeds to 57,125 marks. Upon an application made by Messrs. *Baur* to the *Danish* government, stating that they had before the seizure accepted bills to the amount of 31,761 marks *banco* upon the credit of the consignment, they were permitted to reimburse themselves by retaining that sum out of the net proceeds, and were ordered to pay over the residue, viz. 25,364 marks, into the *Danish* treasury, on account of the government, and which was accordingly done. The invoice price of the coffee in *England* was 2720*l.* The Defendant, after advice of the seizure, adjusted a loss of 35 *per cent.* upon account. The question for the opinion of the Court was, whether the Plaintiffs were entitled to recover from the Defendant the 44*l.* 16*s.* for which the verdict was taken,

or

or any and what other sum. If the Court should be of opinion that the money paid into court covered the whole that the Plaintiffs were entitled to recover, a verdict was to be entered for the Defendant.

Best Serjt., for the Plaintiff, stated that the question intended to be argued was, upon what principle this average ought to be calculated (a). The true principle was recognized in the cases of *Lewis v. Rucker*, 2 Burr. 1170., *Johnson v. Sheddon*, 2 East, 581., and *Tunno v. Edwards*, 12 East, 488. The doctrine to be contended for by the Defendant is, that because the Plaintiff has brought one half of his merchandize to a good market, therefore the underwriter who has insured the other half which is lost, may repair a proportion of his loss by a share of the Plaintiff's gain.

Vaughan Serjt. contra. The confiscation of these goods was a total loss, although there was no notice of abandonment, which is not necessary; whatever, therefore, was saved, was saved for the benefit of the underwriters, consequently the Plaintiff is entitled to recover only the sum which bears the same proportion to his whole subscription as the difference between the amount saved and 3000*l.*, bears to 3000*l.*

HEATH J. It is in the Plaintiff's option to make it either an average or a total loss, and he makes it an average loss.

GIBBS J. If the Plaintiff had brought an action after this salvage for a total loss, the Defendant would have nonsuited him for want of an abandonment. I do not state, that upon seizure by the *Danes* or *Swedes*, the

(a) The Court observed that it was impossible to divine, from the statement of the case, that this was the question to be argued.

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Plaintiff might not sue for a total loss without abandonment; but after the restoration, no abandonment having been declared in the mean time, that which was for a time a total loss, became an average loss; and then all that is restored, is restored for the benefit of the assured, not of the underwriter. The Plaintiff could not recover from the underwriters more than 100 per cent., but he may receive *undequâque* more than 100l.

Judgment for the Plaintiff.

May 12.

WILLIAMS v. BARBER.

A mistake in the date of items in an attorney's bill, which does not mislead, does not vitiate the delivery of the bill a month before action brought.

THIS was an action upon an attorney's bill, which was delivered in *July* 1811; the first business charged in it was charged as being done in *Trinity* vacation 1811: the business so charged was in fact done in *Hilary* vacation 1811, and this might be conjectured from the next items, which were in *Easter* term 1811. After verdict for the Plaintiff, *Shepherd* Serjt. had obtained, and was now, without hearing *Best* Serjt., who was instructed to shew cause, called on to support a rule *nisi* for a new trial, upon the ground that the Plaintiff had not delivered a correct bill, such as was required by the statute, previously to bringing this action.

CHAMBER J. The object of the act was that the bill might be capable of being taxed, there is no difficulty in taxing the bill.

GIBBS J. To say that this business is not described in the bill, because *Trinity* vacation is written instead of *Hilary* vacation, would be trifling with the Court.

Rule discharged.

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HOLLIS v. CLARIDGE.

May 12.

THIS was an action of trover for title deeds. Upon the trial of the cause at the sittings after *Trinity* term 1812, before *Mansfield* C. J., it appeared that the Plaintiff, being under embarrassments, applied to *Basson* to grant him an annuity, who consented so to do, provided he were satisfied with the security proposed, whereupon the Plaintiff delivered to *Basson* a building lease granted to him of certain premises, that he might examine the title; and *Basson*, without the assent or knowledge of the Plaintiff, who had another solicitor concerned on his part, delivered the deeds for investigation on the part of *Basson* to the Defendant, who had obtained a certificate as a conveyancer, but had not been admitted as an attorney, and was then employed as clerk to a solicitor. It had been agreed that if the annuity should be granted, the expences of preparing the securities should be borne by the grantor. The Defendant having heard some report disadvantageous to the character of the Plaintiff, upon that ground, and not upon any defect of the title, advised *Basson* to reject the proposal, which he accordingly did, and the Plaintiff, by *Basson's* direction, drew out and delivered to the Plaintiff a bill of his charges for investigating the title, and detained the deeds until he should be paid those charges by the Plaintiff, contending that he had a lien for them. *Mansfield* C. J. was of opinion, upon this evidence, that as the Plaintiff was to pay all the expences if the business was completed, and as it was in evidence that the annuity went off on the ground of something unpleasant on the side of the Plaintiff, the Plaintiff must be at the expence of the investigation; and not allowing any lien to the Defendant expressly as attorney,

but

The lien which an attorney has on the papers in his hands, is only commensurate with the right which the party delivering the papers to him, has therein.

Every one, whether attorney or not, has by the common law a lien on the specific deed or paper delivered to him to do any work or business thereon, but not on other muniments of the same party, unless the person claiming the lien be an attorney or solicitor.

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but being of opinion that, whether cloth or any other goods be delivered to have any operation done thereon, the bailee may retain them when finished until the work be paid for, he directed a nonsuit.

Best Serjt. in *Michaelmas Term* 1812, moved for a rule nisi to set aside the nonsuit, and have a new trial, upon two grounds: first, that the attorney of an adverse party has no lien on the papers of the person against whom he is employed: his possession being only the possession of the party to whom they were delivered for inspection, who clearly has no lien for the expences of investigating a title proposed to him for approval; all the cases of lien being between attorney and client, not between party and party. Secondly, that the right of lien, which an attorney possesses, is only by reason of his being an officer of the court, and under its controul, and that certificated conveyancers and special pleaders who are not officers, have no lien. He further observed, that although it is usual for persons who grant annuities to pay the expence of the securities, it would be of the worst tendency if a person could get the papers of a needy man into his hands under pretence of granting him an annuity, and could, after refusing his title, detain his muniments until he had extorted a charge for the examination.

Leis Serjt. on this day shewed cause against the rule: he did not contend that *Basson* had a lien on the papers; but the Defendant, who was a professional man, had a lien for the business he did respecting them; and that, indifferently, whether the papers were the property of *Basson*, or of the Plaintiff, since they once came to his hands. This was the ordinary law as it respected all liens. As to the second point, it was immaterial that the Defendant was not an attorney, since the papers were

were delivered to him to have an operation performed thereon.

Best, contra, was stopped by the Court.

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HEATH J. We are all clearly of opinion that the Defendant cannot support his lien as against the Plaintiff. It is not true that the Plaintiff gave these papers to *Basson* to be submitted to the Defendant, he gave them to *Basson* that he might look at them himself, or take the opinion of others, as he would, but that gives the Defendant no lien.

CHAMBERE J. I am of the same opinion, and it would be extremely mischievous if it were otherwise.

GIBBS J. If the Plaintiff had employed the Defendant to look into the lease, the Defendant would, I think, have been entitled to retain the lease till he was paid for the work which he had performed on it, without reference to the question whether he is an attorney or not: for upon the second point, I think the distinction is, that if this lease were delivered to the Defendant by a person having a right to dispose of it, that he might do any thing upon this particular deed, by the general law of the land he has a lien on it, whether he is an attorney or not; if it were another deed than that on which the operation is to be performed, it would be necessary for him to be an attorney, to have the benefit of the custom, and to enable him to retain other papers than those on which the work is to be done. But as to the first point, the Defendant does nothing for the Plaintiff; the Plaintiff delivers the lease to *Basson*, to look into it for himself, and he, acting for himself, cannot, by giving the deed to the Defendant, give him a better title than he, *Basson*, himself has; but he has no other right than to look into the deeds for his own satisfaction.

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After he has inspected them, not on any defect in the title, but for some other cause, he breaks off the treaty: the other says, give me my lease back; no, says he, the Defendant must be paid first. But it is *Basson* who alone is bound to pay him. Suppose one having a diamond, offers it to another for sale for 100*l.* and gives it him to examine, and he takes it to a jeweller, who weighs and values it; he refuses to purchase, and being asked for it again, he says, the jeweller, must be first paid for the valuation; as between the jeweller and purchaser, the jeweller has a lien; but as against the lender, he has no right to retain the jewel: it seems to me that this case is similar. I have stated the reasons more particularly, because my Lord was of a different opinion at *nisi prius*, but a Judge cannot always at *nisi prius* entirely understand the cause. (a)

Rule absolute.

(a) See *Furlong v. Howard*, 2 *Schools and Leffroy*, 115. and *Ex parte Nesbit*, *ibid.* 279.

May 11.

HUTCHINSON v. PIPER and Another.

The Defendants discounted for *B.* a bill post-dated 16 days, and gave in lieu thereof, not money, but a bill drawn by *B.* and

accepted by *A.* for *B.*'s accommodation, which the Defendants then held, having before discounted it for *B.*, and which then had seven days to run. Within those seven days *B.* gave up that bill to *A.*, who destroyed it. The Defendants having allowed no rebate on this bill, held that it might be averred in an action for usury as a loan of the amount of the bill discounted, lent on the day when the bill given in lieu could have been enforced by the Defendants.

Under a count for usury in discounting two bills in the possession of *B.*, one of which is described as drawn by *B.* on a certain person, to wit, *John K.*, it is a fatal variance if the bill produced appears to be drawn on *Abraham K.*

September

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September 1714, to wit, on the 30th of April 1810, to wit, at *Dorking*, between the Defendants and *P. Botham*, took, accepted, and received of and from *Botham* a certain sum of money, to wit, the sum of 17*s.* 2*d.*, by way of corrupt contract, bargain, and loan for the Defendants' forbearing, and giving day of payment of a certain sum of money, to wit, the sum of 35*l.* 8*s.* 9*d.*, before the commencement of that suit, to wit, on the 7th day of May 1810, at *Dorking*, lent and advanced by the Defendants to *Botham*, from the time of lending and advancing the same until and upon the 16th day of May 1810, which sum of 17*s.* 2*d.* so taken, accepted, and received by the Defendants, of and from *Botham*, in manner and for the cause aforesaid, exceeded the rate of 5*l.* for the forbearance of 100*l.* by the year. The 21st count stated that *Botham* was possessed of two bills, viz. one drawn by *Botham* on and accepted by *Maynard*, for payment on the 24th November 1810 to the drawer or his order, of 358*l.* 14*s.* 11*d.*, and the other drawn by *Botham* on a certain person, to wit, one *John Kitchen*, requiring the said *John Kitchen* to pay, on the 18th of October 1810, to the order of the drawer, 37*l.* 10*s.*, and accepted by the said *John Kitchen*, and that the Defendants held a bill, drawn on the 14th July 1810 by *Botham* on *Green*, at three months and 14 days date, for 373*l.* 17*s.*, and that it was, on the 21st of August 1810, corruptly agreed, that the Defendants should discount *Botham's* two bills for him, and that in respect of the discounting them, and instead of money, he should receive the bill on *Green*, which the Defendants held, without any allowance by the Defendants to *Botham* by way of rebate, in respect of the time which that bill had to run; and that the Defendants should receive from *Botham* the full discount of five per cent. from 21st August until those bills should respectively become due, viz. on the first bill, until 24th No-

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vember, and on the last, until 18th *October*, and that the bill on *Green* should be taken by *Botham* as cash; and that in pursuance of that corrupt agreement, *Botham*, on 21 *August*, delivered to the Defendants the two first mentioned bills to be discounted by the Defendants, and the Defendants discounted them, and in pursuance of the corrupt agreement, and upon the terms thereof, and on the discounting of those bills, delivered to *Botham* the bill on *Green*, of which they were so possessed, in lieu of money, and *Botham* received from the Defendants that bill, having such time to run before it became due, as money, and without any allowance by way of rebate for the time which that bill had to run; and the Defendants afterwards on the same day, according to the said corrupt agreement, received from *Botham* the full discount of 5 per cent. upon the sum of 396*l.* 4*s.* 11*d.* viz. 5*l.* 3*s.* 3*d.*, without making any discount or allowance by way of rebate for the time which the bill on *Green* had to run, which sum of 5*l.* 3*s.* 3*d.* so taken, exceeded the rate of 5*l.* for forbearing 100*l.* for a year, &c. Upon the trial of the cause at the *Surry* summer assizes 1812, before Lord *Ellenborough* C. J. it appeared that the Defendants were bankers at *Dorking*, and that Mr. *Botham*, who kept a banking account with them, had frequently induced them to discount bills for him; at a certain period the Defendant *Derudney* told him his house could not continue discounting for him on the common terms of five per cent., they must have something more. *Botham* told him it was usury: he answered, he did not mind that, he would meet *Botham* on that question. The declaration contained counts for the recovery of very large penalties upon numerous transactions subsequent to this conversation: the evidence applying to the 14th count, founded on the 6th of these transactions, was,

that on the 30th of *April* 1810, *Botham* carried to the Defendants a post dated bill, bearing date the 16th of *May* 1810, and drawn by *T. Kenworthy, Wright, and Co.*, in favour of No. 1213., or bearer, for 351*l.* 8*s.* 9*d.*; the Defendants discounted it for 16 days, and charged in the banking account of *Botham* 17*s.* 2*d.* for the discount of it. The Defendants had at that time in their hands a bill for 378*l.* 15*s.* dated the 16th of *February* 1810, drawn by *Botham* upon, and accepted by *John Ault*, payable to the drawer or his order, at 77 days after date. This bill had originally been drawn and accepted for the accommodation of *Botham*, who agreed with *Ault* to provide money to discharge it when due: the Defendants had on a former day discounted it for *Botham*: this bill, which would become payable on the 7th of *May*, the Defendants gave to *Botham*. They entered on that day to his credit, "checks and cash 451*l.* 8*s.* 9*d.*," which was explained to consist of the bill for 351*l.* 8*s.* 9*d.* and a cash note for 100*l.*, which *Botham* carried to them at the same time. *Botham*, on the 1st of *May*, gave up this bill to *Ault*, who destroyed it before the 7th of *May*. It was objected on behalf of the Defendant, that this evidence did not prove the averment of a loan of money made by the Defendants to *Botham* on the 7th of *May*, and forbearance from the 7th to the 16th, and the taking of 17*s.* 2*d.* for usurious interest upon that forbearance: the counsel for the Plaintiff insisted, on the authority of *Wade v. Wilson, 1 East, 195.*, that the evidence supported the averment; for that though *Ault's* acceptance was for 378*l.* 15*s.*, yet the only sum applied to this transaction was 351*l.* 8*s.* 9*d.* Lord *Ellenborough* held this was no loan, and could not be the subject of usury: there was no evidence of the forbearance of money or money's worth. He thought, too, that since the bill on *Ault* was destroyed before the 7th of *May*,

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the time of forbearance was wrongly stated; there was no time at which he could say the forbearance commenced, except the day of the transaction, viz. the 30th of *April*, and therefore in that respect there was a variance. Upon the transaction stated in the 21st count, it appeared in evidence that the bill for 37*l.* 10*s.* on *Kitchen* was drawn not on *John*, but on *Abraham Kitchen*, which was the real name of the drawee. Lord *Ellenborough* held that this also was a fatal variance, and 'none of the other numerous counts being proved, he directed a nonsuit, but reserved liberty to the Plaintiff, upon these two questions, to move to set it aside. Accordingly *Best* Serjt. in *Michaëlas* Term 1812 obtained a rule nisi to that effect.

Shepherd Serjt. upon this day shewed cause, when the Court intimated so clear an opinion that the variance in the description of *Kitchen's* bill was fatal, that *Best* abandoned that point. Upon the 14th count *Shepherd* contended, first, that this was no loan of money; secondly, that if it were, the time of forbearance was incorrectly stated. As to the first point, it was necessary to shew that there was a loan of money or something equivalent to a loan of money from the Defendants to *Botham*. In certain cases transactions which were not directly loans, had been considered as loans of money, because they were tantamount to it: such was *Wade v. Wilson*, but it was not here applicable. *Botham* never received any money's worth. If the bill on *Ault* had been drawn for a valuable consideration, and *Ault* had, when it fell due, paid the contents to *Botham*, it would have been otherwise. As to the 17*s.* 2*d.* it never was paid; it was, indeed, charged in *Botham's* banking account, but as Lord *Ellenborough* properly held, it seemed rather to be an item in an account, than a payment of money. To hold this to be usury, would be to
 make

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make rights stand in the room of actual loans. The Plaintiff might state this to be an usurious transaction by stating the securities on the one side, and on the other: he might also state it as a money transaction, but if he does, he must state the real times when sums of money pass. It is not because a man receives a sum of money which he ought not to receive, that the act is therefore usurious. *Barclay v. Walmisley*, 4 *East*, 55. That was urged to be equivalent to lending the amount of that bill from 20th *August* to 7th *September*, yet held no usury, because there was no loan of money. So neither was there here, nor in that point of view, is this tantamount to a loan of money. The Defendants here give *Botham* something of a greater amount than the bill which they discount. It is imputed that because the Defendants did not make a rebate of interest on that bill which they gave up on the 30th *April*, they are guilty of usury; but if so, the offence is not that the Defendants have received more than legal interest on the 35*l.* 8*s.* 9*d.*, from the 7th *May*, but that they have received the full amount of the undue bill without giving back to the payer any interest for the time it had to run: but that is not a loan of money on the 30th *April*, neither was it a loan on the 7th of *May*. If the time of the loan be the time when that bill was cancelled, it must be some time previous by three or four days to the 7th of *May*, for in that interval the bill was destroyed, but this was not a loan of money, and therefore the nonsuit ought to stand.

Best and *Vaughan* Serjts. in support of the rule. This is a loan of money made on the 7th of *May*, because on the 7th of *May* the Defendants could have recovered against *Ault* the sum for which the bill is given, when they parted with this bill they parted with the right of recovering 37*l.* 15*s.* This then is money's worth in the

hands

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hands of those who might have recovered it. This being so, *Botham* applies to them to discount a bill, and they say to him, we have a security of yours which will be due on the 7th of *May*, and if you do not then pay it, we may recur to *Ault*, we will lend you that: they take interest upon the bill which they discount for him, and usuriously give him in exchange this bill, which they might have converted into cash on the 7th of *May*. This differs from *Barclay v. Walmsey*. There had been no loan from the acceptor to the holder of the bill. On the contrary, there the creditor says, "sooner pay me back the money I have lent you, and I will rebate a part of my debt." It is clear that was no usury. *Wade v. Wilfen* is precisely like this case. Here the bankers having a right to proceed against *Ault* the acceptor, part with it on condition that *Botham* the drawer shall give them another bill. If the change of securities in the one case will constitute usury, so will it in the other. If instead of exchanging paper, the parties had gone through the ceremony of putting down the money, it would not have differed the case. *Manners q. t. v. Pojiam*, 3 *Bos. & Pull.* 343. has decided that the loan of an available security may be considered as money's worth, and will make an usurious transaction: this therefore must be usury, for this is the loan of an available security, which is money's worth. The destruction of the bill could make no difference in the transaction: the loan cannot be dated from that period: it is the giving up the bill by the Defendants which completes the transaction. How then is it a loan, but from the time when the bill is payable? Even the entries made only consider it as a loan from that period. Therefore the allegation is proved.

Per Curiam. We think on the whole there ought to be a new trial.

Rule absolute.

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SEWELL, Plaintiff; WM. FLEMING, Esq., CHAS.
WILLIAMS, Esq. and Others, Deforciant.

May 13.

THERE were ten parties to this fine, and they had all been comprehended, as it was supposed, in one writ of covenant, and the acknowledgments of all the parties were taken; but *Charles Williams* was therein by mistake called *George Williams*. The error being discovered, a new *precipe* and *dedimus potestatem* were sued out, in which all the parties were correctly named, but *W. Fleming* having in the mean time quitted the realm for foreign service, a new acknowledgment could not be obtained from him: the acknowledgment of *Charles Williams*, however, being obtained, *Lens Serjt.* moved that the fine might pass as to all the parties as one fine. He was instructed that he had the authority of the curfitors that this might be done, although not without the permission of the Court.

One of several curfitors having been misnamed in one *precipe* and writ of *dedimus potestatem*, under which his acknowledgment had been taken, and he having acknowledged under a new *precipe* and *dedimus potestatem*, in which he was rightly named, but to which the acknowledgment of another of the curfitors, who was then abroad, could not be obtained, The Court permitted one fine to be compounded of the acknowledgments under the two several writs, but at the peril of the parties.

The Court first felt a doubt whether, considering this as a real action, the Plaintiff could declare in one declaration against all the Defendants comprehended in two several processes: the Court, however, permitted them all to be comprehended in one writ of covenant and one fine, but added, that although it did not appear what harm or inconvenience could result from the practice, the parties must take it at their peril.

• *Fiat.*

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POPE v. TURNER.

A Defendant who is served with process and notice of declaration both on the return-day of the writ, may treat the declaration and notice as a nullity.

THE Defendant was served, on the 9th of February, with a writ of *capias* returnable in eight days of the Purification; and within an hour after, he was served with a notice of declaration in chief. He never took the declaration out of the office. On the 19th of April he was served with notice of a writ of inquiry.

Heywood Serjt. had before obtained, and now supported a rule *nisi* to set aside the proceedings for irregularity, against which *Byst* Serjt. shewed cause.

The Court and the officers agreed that the practice enabled the Defendant to treat the declaration and notice as a nullity.

Rule discharged.

REX v. The Sheriff of SUFFOLK, in the Case of TURNLY, v. SELLEY.

If a Defendant, sued by a wrong name, appears and perfects bail by his right name, without identifying himself as the person sued by the other name, the Plaintiff may treat the bail as a nullity, and attach the sheriff.

THE Defendant having contracted with the Plaintiff through the medium of letters which he subscribed by the name of *Selley*, the Plaintiff sued out a writ against him by that name, under which he was taken, and gave notice of bail by the name of *Selby*. The sheriff being ruled to return the writ, returned *cepi corpus*. The Plaintiff taking no notice of the bail which the Defendant had given, proceeded to obtain an attachment

Or he may waive the variation of the Defendant's name, at his own option.

against

against the sheriff for not bringing in the body, which *Blosset* Serjt. had obtained a rule *nisi* to set aside, upon the ground that the Defendant had perfected his bail before the attachment.

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Lens Serjt. now shewed cause. The Plaintiff knew that he had no cause existing against *Selby*, and the Defendant gives no intimation that he is the same person sued by the name of *Selley*, therefore the Plaintiff is regular in taking no notice of the bail put in by *Selby*.

Blosset, contrā. By what name the Defendant contracted, is immaterial. The Defendant swears he appeared by his true name, which is *Selby*. The sheriff's return, that he had taken the within-named Defendant, is true, for the Defendant is within-named, though incorrectly named. Of the identity of the person there is no doubt. By what name soever a Plaintiff sues a Defendant, if the latter puts in bail by his right name, the Plaintiff ought to declare against him by that name. It is all in the Plaintiff's favour that the Defendant, being sued by a wrong name, waves his action of trespass for the arrest, his plea of misnomer in abatement, and every other advantage which he may take of the Plaintiff's mistake: it is not competent for the Plaintiff still to take advantage of his own blunder. If he had appeared as *Selby*, sued by the name of *Selley*, it would not the more make the writ correct, though he thereby apprizes the Plaintiff of his mistake; and the question is, whether, when the Defendant has waved and substantially corrected the Plaintiff's mistake, he is bound formally to allege on the record that the Plaintiff labours under an error. The case of *Murray v. Hubbart*, 1 Bos. & Pull. 645. cannot be supported, unless this rule be made absolute.

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MANSFIELD C. J. The sole question is, whether a man putting in bail in one cause, can satisfy the writ where he has been arrested in another cause. Therefore the rule must be discharged. If the Plaintiff chooses to waive the variation of name, that is another thing.

Rule discharged.

May 13.

GOODTITLE v. BADTITLE.

The Court will not, after a Plaintiff has obtained judgment and possession in an undefended ejectment, without collusion, and has sold part of the premises and transferred the possession, let in a landlord to defend, from whom his tenants had concealed the ejectment.

THE Plaintiff's lessor having recovered certain premises in an undefended ejectment, and afterwards contracted for the sale of a part, and let the purchaser into possession, *Vaughan* Serjt. had obtained a rule nisi that the judgment and writ of possession might be set aside, and that Mr. *Brensford* might be permitted to appear and defend as landlord, upon an affidavit that neither of his two tenants, who were in possession when the action was brought, had informed him of their having been served with a declaration.

Shepherd Serjt. shewed cause, upon the ground that since the possession had been adversely changed, the Court would leave the person claiming as landlord, to his ejectment.

Vaughan, in support of his rule, urged the much greater hardship which lay on a landlord if he were to have the trouble of making out his title and recovering thereon, than if he might rely on his ancient possession, and offered to pay the costs.

Per Curiam. No collusion is suggested: if the lessor of the Plaintiff had colluded with the landlord's tenant,

we

we could have interfered. But here the case is the same as if the tenant had delivered over the possession wrongfully to another person. The landlord must bring an action of ejectment to recover it. How can we deal with the lessor of the Plaintiff? he has not been to blame. If your tenant has done you wrong, that is only a matter between him and you.

Rule discharged.

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SIMPSON v. MORRIS.

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THE Plaintiff declared that the Defendant threw on a certain apartment of the Plaintiff, and on the Plaintiff, then being therein, great quantities of water. The Defendant pleaded first, the general issue; secondly, that he was possessed of a dwelling-house contiguous to the Plaintiff's dwelling-house, and that the Defendant had an antient window looking thereto, and that the Plaintiff had wrongfully begun to block up the Defendant's antient window, and the Defendant prayed her to desist, and because she refused and did not desist, he threw a little water into the room to hinder the Plaintiff from obstructing the window. The Plaintiff replied *de injuria sua propria*. After a verdict for the Plaintiff for 40*l.* upon the first plea, and on the second for the Defendant, with liberty to the Plaintiff to move to enter up judgment on the first for the Plaintiff, with 40*l.* damages, *non obstante verdicto* for the Defendant on the second plea, if the Court should think this plea could not be supported, *Best* Serjt. having obtained a rule *nisi*, *Vaughan* and *Pell* Serjts. now shewed cause. The resistance which a person may make in defence of his property to the violence which is used against it, is not confined to the proof that he *mollitur manus*

Trespass for throwing water over the Plaintiff's apartment and herself. It is no plea that the Plaintiff was engaged in obstructing an antient window of the Defendant's house, and that the Defendant threw water over her to prevent it.

imposuit.

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imposuit. In the case of *Weaver v. Busb*, 8 T. R. 78. blows with a stick were held justifiable, over-ruling *Jones v. Tresilian*, 1 Mod. 36. *Gregory v. Hill*, 8 T. R. 299., only proves that violent beating does not come within the allegation of *mollitur manus imposuit*. *Green v. Goddard*, 1 Salk. 641.. In the case of actual force, as in burglary, as breaking open a door or gate, it is lawful to oppose force to force: and if one breaks down the gate, or comes into my close *vi et armis*, I need not request him to be gone, but may lay hands on him immediately; for it is but returning violence with violence. So if one comes forcibly and takes away my goods, I may oppose him without more ado, for there is no time to make a request. The violence used in this case was of a nature much less injurious to the Plaintiff than blows, which would have been justifiable. If a greater degree of violence had been used than was necessary to deter the Plaintiff from the execution of her purpose, she might have newly assigned the excess. The plea is well pleaded.

Best, in support of his rule, was stopped by the Court.

MANSFIELD C. J. There is no pretence for supporting this plea.

CHAMBER J. Wherever a party stopped in a trespass uses force, that is a justification to the owner of the ground, to use force too, and the universal form of plea is, that the Defendant requested him to go out, and he would not, ~~when~~ *molliter manus imposuit*; and that then the Plaintiff assaulted him, and then justify *son assault de mesme*, and it was never heard of in such a case that it was necessary to new assign.

The rest of the Court concurring, the rule was made

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WATKINS v. BIRCH and Another.

May. 13.

THIS was an action of trespass against the sheriff of *Middlesex*, who had taken certain goods in execution at the suit of *Bluefield* against *Duncan*. *Duncan* had executed a warrant of attorney to confess a judgment to the Plaintiff, and after judgment entered up, she issued a *feri facias*, and caused the effects of *Duncan* to be sold by public auction; and herself became the buyer, whereupon the sheriff, in *February* 1811, in consideration of 58*l.* which the Plaintiff actually paid, executed a bill of sale of the goods to the Plaintiff: in *May* 1811 she agreed to let the goods to *Duncan*, who still retained the possession, for a rent, which was regularly paid, and receipts given. When *Bluefield's* execution was about to be levied, *Duncan* clandestinely removed certain other goods which were in his possession, but none of those which the Plaintiff had so bought. Upon the trial of the cause, *Pell* Serjt. for the Defendant, endeavoured to establish upon the cross examination a case of actual fraud on the part of the Plaintiff, but the facts completely rebutting it, a verdict passed for the Plaintiff.

A creditor having taken in execution the goods of a Defendant who had confessed judgment, and having herself bought them by public auction, and taken a bill of sale for a valuable consideration from the sheriff, and let the goods to the former owner for a rent, which was actually paid, has a title which cannot be impugned as fraudulent by other creditors having executions against the same Defendant.

Pell had afterwards obtained a rule *nisi* to set aside the verdict and enter a nonsuit, contending that this came within *Twyne's* case, 3 *Co. Rep.* 20.

Best Serjt. now shewed cause against the rule. The notoriety of the sale to the Plaintiff, and payment of rent, disaffirm all pretence that there was fraud in fact here; in fact, if there were, the Defendant ought to have gone to the jury on it, which he declined doing: there is as little ground to impute fraud in law: this bears no resem-

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resemblance to *Twyné's* case, but exactly coincides with the case of *Kidd v. Rawlinson*, 2 Bos. & Pull. 59.

Pell Serjt. contra. It is a badge of fraud that the judgment to the Plaintiff was confessed by *Duncan* by a warrant of attorney, and that the Plaintiff was a creditor of *Duncan's*, a circumstance on the absence of which Lord *Eldon* strongly relies in the case of *Kidd v. Rawlinson*, as a test of the good faith of that transaction. That circumstance creates the inference of a secret trust in the transaction, and Lord *Coke* says in *Twyné's* case that the continuance in possession is a sign of a trust. The secrecy of this transaction, in which there was no notoriety, according to the judgment of *Heath J.* in *Kidd v. Rawlinson*, differs this from that case.

MANSFIELD C. J. Unless it can be made out that the fact of a former owner of goods being in any way afterwards permitted to possess them is a badge of fraud, I know not how this verdict can be set aside. The Plaintiff buys these goods, and lets them, and receives rent for them; and can we say that a person who, under an execution, has bought goods, may not let them to the former owner of them? No case has gone so far as that. It is a much stronger case on account of the letting of the goods, than if she had permitted them to remain in the custody of *Duncan* without any consideration.

GRIS J. It is impossible to distinguish this case from the case of *Kidd v. Rawlinson*, the circumstance of the Plaintiff being a creditor makes no difference, if the creditor takes a regular bill of sale from the sheriff.

Rule discharged.

1813.

DEAKIN v. PRAED and Another.

May 19.

THE Plaintiff had been indicted for feloniously stealing country bank notes to the value of 3000*l.*, the property of *William Lambert White* and *Henry Whitmarsh*, and having succeeded in a motion for putting off his trial upon the absence of a material witness, was admitted to bail, and at the next assizes the Plaintiff not surrendering himself, the recognizances of his bail were estreated and paid, and the prosecutors were proceeding to outlawry against the Plaintiff. The Plaintiff having paid into the Defendant's banking-house a considerable sum, believed to be the proceeds of the stolen notes, and they, after notice of the felony, refusing to pay it him, he brought an action against them in the King's Bench, which was twice stayed by a Judge's order until the indictment should have been tried. The Plaintiff had, since his default, discontinued that action; and, pending the proceedings in outlawry, had assigned all his property to *Dudfield*, who had served the Defendants with a copy of the assignment, and notice that he was assignee, and that they should pay over the money to no one but himself. *Best* Serjt. now moved that the Defendants in this action might have time given them to plead in a month after the trial of the indictment. The Court advised that the notice should be carefully preserved as furnishing material evidence between *Dudfield* and the crown in case of conviction, and granted a rule nisi.

The Plaintiff being indicted for felony, sued a banker for money the Plaintiff had paid him, which was furnished to be the produce of the felony, the Court, on application, will give time to plead in a month after the trial of the indictment.

Vaughan Serjt. on a subsequent day shewed cause, and *Best* supported his rule, which the Court made

Absolute.

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COTTERELL v. DUTTON.

Tenant in tail dies leaving issue in tail a granddaughter a feme covert, the granddaughter dies-covert, leaving issue in tail two sons infants, the elder attains the age of 21 years and dies, the younger attains his age of 21, and 14 years after issues out a writ of formedon in the descender: Held that he is barred by the statute 21 Jac. I. c. 16.

THIS was a writ of *formedon* in the descender, by which the Demandant, in *Trinity* term, 51 Geo. 3., demanded of the Defendant certain closes situate in the parish of *Mickleton* in the country of *Gloucester*, and after reciting the writ, averred that *Wm. Smart*, after the 4th day of *February* in the reign of the late King *Henry* the Eighth, gave the said tenements with the appurtenances to *David Hughes* and *Baptist Smart*, their heirs and assigns, to the use of *Wm. Smart* and his assigns for his life, remainder to the use of *Colles Smart* his wife, and the heirs of the body of *Colles* by the said *Wm. Smart* lawfully begotten; whereby and by force of the statute for transferring uses into possession, the said *Wm. Smart* became and was seized of the same tenements with the appurtenances, in his demesne as of freehold, for the term of his life, according to the form of the gift aforesaid in time of peace, in the time of the Lord *George* the Second, &c. by taking the esplees thereof to the value of 10*l.* with remainder to *Wm. Smart* and *Colles*, in her right, and the heirs of the body of *Colles* by *Wm. Smart* lawfully begotten; and *Wm. Smart*, being so seized, afterwards, on the 1st day of *July* 1769, at, &c. died, whereupon, and by force of the statute, the said *Colles* became and was seized of the same tenements with the appurtenances in her demesne as of free and right, (to wit) to her and the heirs of her body by *Wm. Smart* lawfully begotten, in time of peace, in the time of our Lord the now King, by taking the esplees, &c. and being so seized, the said *Colles*, afterwards, to wit, on the 3rd day of *March* in the year of our Lord 1770, at, &c. died, leaving *Eleanor Utterell*, who was then under-coverture of

of *Edward Cotterell* her husband, the heir of her body by the said *Wm. Smart* lawfully begotten, as the said *Eleanor Utretia* was the only daughter and heiress of *Mary Freeman*, who was the only child of the body of the said *Colles* by *Wm. Smart* lawfully begotten; whereupon the right to the said tenements with the appurtenances descended from the said *Colles* to the said *Edward Cotterell* and *Eleanor Utretia*, in right of the said *Eleanor Utretia*, according to the form of the gift aforesaid. And the said *Eleanor Utretia*, on the 1st day of *November* 1785, at, &c. died covert of the said *Edward Cotterell*, leaving *Thomas Freeman Cotterell* her eldest son and heir of her body lawfully begotten, and in fact under the age of 21 years, (that is to say,) of the age of 13 years; and the demandant, the second son of her body lawfully begotten, also an infant, under the age of 21 years; whereupon the right to the said tenements with the appurtenances descended from the said *Eleanor Utretia* to the said *Thomas Freeman Cotterell* as the son and heir of the body of the said *Eleanor Utretia Cotterell*. And the said *Thomas Freeman Cotterell* afterwards, on the 16th day of *September* in the year of our Lord 1794, at, &c. died, without heir of his body lawfully begotten, the Demandant then being an infant under the age of 21 years, (that is to say,) of the age of 18 years; whereupon the right of the said tenements with the appurtenances descended to the Demandant, as brother and heir to the said *Thomas Freeman Cotterell*, and the heir of the body of the said *Eleanor Utretia Cotterell* lawfully begotten, and which after the death, &c., and therefore he brings suit. The tenant pleaded seventhly that the said title and cause of action to and for the said tenements with the appurtenances above demanded by form of the said supposed gift in the said writ and declaration mentioned, after the death of *Colles Smart* did not first descend or fall within 20 years next before the suing forth the

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Demandant's said writ; eighthly, that *Colles Smart* died more than 20 years before the suing out of the Demandant's writ in this behalf, to wit, on the, first day of *March 1770*, at, &c., and that *Eleanor Utratia Cotterell* was then and there, until the time of her death, under coverture, as in the declaration is alleged, and that the said *Eleanor Utratia* died more than 10 years before the suing out of the Demandant's writ, to wit, on the 1st day of *November 1785*, to wit, at, &c.; ninthly, that *Colles Smart* died more than 20 years before the suing out of the Demandant's writ in this behalf, to wit, on the 1st day of *March 1770*, at the parish, &c.; and that *F. U. Cotterell* was then and there, and until the time of her death, under coverture, as in the declaration is alleged; and that she died more than 10 years before the suing out of the Demandant's writ, to wit, on the 1st day of *November 1785*, to wit, at, &c.; and that at the time of the death of *T. F. Cotterell*, the Demandant was an infant under the age of 21 years, as in the declaration was alleged, and that the Demandant afterwards, to wit, on the 1st day of *December 1797*, and more than 10 years before the suing out of the Demandant's writ, attained his age of 21 years, to wit, at, &c., and this, &c. To these pleas, the Demandant demurred generally, and for want of sufficient pleas, prayed judgment and seisin of the said tenements according to the form of the said gift to be adjudged to him, &c. The tenant joined in demurrer.

Lens Serjt. in support of the demurrer. These questions depend on the construction of the statute 21 *Jac. 1. c. 16. ss. 1. and 2.* The seventh and eighth pleas are answers only in part. The fact is stated in the ninth plea that the Demandant attained his full age in 1797, and it is contended by the tenant that the Demandant was

bound at all events to pursue his remedy within ten years from that period. There has been no decision to this effect in any case of *formedon*. No case shews who is the heir protected by the act. In the case of *Doe* on demurrer of *George v. Jeffon*, 6 *East*, 80. the Court of King's Bench indeed determined, contrary to the apprehension of the profession at that time, that the daughter, whose brother had died a minor before entry after the ancestor's death, was entitled, for the purpose of bringing her ejectment, to ten years only from the time of her brother's decease, the ancestor having been dead more than twenty years in the whole. The word death in the second clause, it is contended, must mean the death of the person to whom the title accrues though under disability, and after such event his heirs have only ten years to sue from the death of their ancestor; so that though there should be a succession of disabilities, the second person disabled, though apparently equally entitled to the protection of that statute as the first, must sue within 10 years. If this be the true construction, it is to be lamented that the act, instead of protecting those whom it was intended to protect, so narrows the benefit, that if the first person to whom the estate tail descends be a feme covert, and dies, and leaves her own heir an infant, or a daughter under coverture, though such person cannot be guilty of laches in law, the statute runs against her; this would be so harsh and unfavourable a construction, that it is necessary to understand that the infant has 20 years after the decease of her mother. If not so, the only distinction that can be made, is between the nature of an estate tail, and of another estate. The issue in tail takes *per formam doni*, and every successive heir in tail is of a double capacity, taking partly *per formam doni*, and partly by descent.

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Runnington Serjt. contra, was stopped by the Court.

MANSFIELD C. J. The daughter and infant heir of a *feme covert* has ten years after the disability ceases, not from the death of her mother. In the case of fines it has been determined that when the time once begins to run, it continues so to do, notwithstanding any subsequent disability, as Lord *Kenyon C. J.* decided in the case of *Doe, on Demise of Dutoire, v. Jones*; 4 T. R. 300.

HEATH J. agreed that in the case put the infant heir of a *feme covert* would have ten years from the cesser of the disability, not from the death of her mother. There is no such difference between the issue in tail and other heirs as is supposed: formedon in the disceder is expressly mentioned in the first clause of the statute.

CHAMBER J. The ten years do not run at all while there is a continuance of disabilities, but they run without intermission from the time that the disabilities first cease.

GIBBS J. When once the statute begins to run, nothing stops it.

Judgment for the Tenant.

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The Principal and Fellows of the KING'S HALL
or College of BRAZLN NOSE, in the University
of OXFORD, v. The Bishop of SALISBURY, the
Master, Fellows, and Scholars of SAINT JOHN
the EVANGELIST, in the University of CAM-
BRIDGE, and EDMUND OUTRAM D.D.,

THIS was an action of *quære impedit*, brought by the
Plaintiffs against the Defendants for the alternate
presentation to the church of *Wootton Rivers*, in the
county of *Wilts*. The declaration set out the Plaintiffs'
title to the alternate presentation, under the Dutchess
Dowager of *Somerset*, and alleged a vacancy in their turn
by the cession of the Defendant *Outram*, who came in
on the presentation of *St. John's* College. The bishop
claimed nothing but as ordinary. *St. John's* College and
Dr. *Outram* pleaded, that the church was, at the time
of commencing this action, and for six months before,
full of the Defendant *Outram*, traversing the voidance
by his cession; and on that traverse issue was joined.
The cause came on to be tried at the *Salisbury Lent*
assizes 1813, before *Wood B.*, and a verdict was found
for the Plaintiffs, with damages 150*l*, subject to the
opinion of the Court on the following case.

The Plaintiffs' title, as set out in the declaration, and
all the presentations there stated, were in fact correctly
stated; and if the church was vacant, it was the Plain-
tiffs' turn to present; the only question between the par-
ties being, whether the Defendant *Outram* had avoided
the rectory of *Wootton Rivers* by his institution and in-
duction to the rectory of *St. Philip* in *Birmingham*, under

If a clerk, hav-
ing a benefice with
cure of souls, takes
another benefice
with cure of souls
of the value of 8*l*,
he thereby vacates
the former.

Where an act
of parliament cre-
ates a new parish
church and rec-
tory, and declares
that the bishop
shall continue a cer-
tain prebend on
the rectory, and
that the prebend
shall remain united
and annexed to
the rectory for
ever, this is not
such an appropri-
ation of the rectory
to the prebend as
makes it an appro-
priate benefice
within the stat.
21 H. 8. c. 13.
s. 31., and tenable
with another be-
nifice having cure
of souls

So, though an-
other act speaks of

the rectory as inseparably annexed to the prebend.

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the circumstances hereinafter stated. The rectory of *St. Philip* was created by a statute, 7 *Ann.*, intituled, "An act for building a parish church and parsonage-house, and making a new church-yard, and new parish, in *Birmingham*, to be called the parish of *St. Philip*," which act was made a public act, though it is not in the statute-book. By which act it was declared, that there should be a rector to have the cure of the souls of the inhabitants of the said parish, and the said rector is made a sole corporation, to have perpetual succession, and may sue and be sued by his corporate name, and take lands to a certain amount. The patronage of the advowson is given by the act to the Bishop of *Coventry and Litchfield* for the time being, and his successors; and these words follow: "And that for the better livelihood and maintenance of the rector, the prebend of *Sawley* in the cathedral church of *Litchfield*, whenever it shall become void, shall be conferred by the bishop for the time being on such person as shall be then rector of the said new church, and that the bishop shall collate him to it, and possession shall be given of it in such form and manner as is usual, and under such conditions, as the statutes of the said cathedral church shall require, to have and to hold the same, so long as he shall continue rector of the said new church in *Birmingham*, and no longer; and whenever by his death, or by any other means, that church shall become void, the prebend shall remain united and annexed to the rectory for ever; that is to say, the succeeding rector shall be collated to the prebend, and installed into it, as usual, under the obligation of all duties, burdens, and charges, to which the prebend is or may hereafter be subjected by the statutes of the cathedral church. Provided nevertheless, and it was thereby declared, that nothing in that act contained should in any sort extend to alter the estate or interest of the then present prebendary of *Sawley* in the pre-

prebend; but that he might let any lease or leases as theretofore had been usual. Provided and it was enacted, that all the rectors of the parish church of *St. Philip* should be presented, collated, instituted, and inducted, as other rectors, parsons, and vicars are accustomed to be." The prebend of *Sawley* was, at the time of passing the act, in the gift of the Bishop of *Coventry and Litchfield*. On the 4th of *October* 1715, *William Higgs*, clerk, was collated to the rectory of *St. Philip*, at which time the prebend of *Sawley* was not vacant. On the 16th of *October* 1719, *W. Higgs* was collated to the prebend of *Sawley*, founded in the cathedral church of *Litchfield* with the treasurer'ship of the aforesaid church annexed. On the 17th of *December* 1733, *Wm. Vyse* was collated to the rectory and parish church of *St. Philip*, and on the 4th of *January* 1733, he was collated also to the prebend of *Sawley*, together with the annexed treasurer'ship. On the 24th of *August* 1770, *Chas. Newling*, clerk, was presented to the above preferment by one instrument, and was instituted into the same by an instrument purporting to be an institution to the prebend of *Sawley* or *Swaley*, and the treasurer'ship, with the rectory of *St. Philip* thereunto annexed, void by the death of *Wm. Vyse*, on the presentation of the Archbishop of *Canterbury*, patron for that turn in right of his option. On the 30th of *March* 1787, *Spencer Madan*, clerk, was collated by one instrument, purporting to be a collation to the prebend of *Swaley* or *Sawley*, the treasurer'ship, with the rectory of *St. Philip* thereunto annexed, void by the death of *Newling*, and belonging to the donation or collation of the Bishop of *Litchfield* and *Coventry* in full right of his bishopric. On the 26th of *June* 1790, *Dr. Madan* was admitted to the dignity or office of a canon residentiary of the cathedral church of *Litchfield*. In 1797, a private act of parliament was passed, intituled, "An act to explain and amend an act passed in the 4th and

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and 5th years of the reign of her late majesty Queen Anne, intituled, 'An act for augmenting the number of canons residentiary in the cathedral church of *Litchfield*, and for improving the deanry and prebends of the said cathedral,' and to make further provisions for the canons residentiary in the said cathedral church, and an addition to the fabric fund 'thereof;' wherein it was enacted, "That the Bishop of *Litchfield* and *Coventry* for the time being should, as often as avoidances or vacancies should happen after the passing of that act, admit and collate clerks duly qualified to all the six residentiaryships; and the canons residentiary so admitted and collated, should be thereupon installed, without any election, in consequence of such admission and collation, and become canons residentiary of the said cathedral church, and members of the chapter of dean and canons residentiary of the same church, to all intents and purposes whatsoever. And it was enacted that the third residentiaryship should consist of (besides the sixth part of the dividend of the residentiaries before mentioned,) the house in the close of the cathedral church of *Litchfield*, then assigned to, or enjoyed by Dr. *Madan*, and prebend of *Sawley*, otherwise *Sallow*, founded in the said cathedral church, and the treasurer'ship of the said church, thereto then annexed, with the appurtenances; which prebend of *Sawley*, with the treasurer'ship and appurtenances should be, and the same was thereby inseparably annexed to the said residentiaryship. And in a subsequent part of the same act, as an addition and further support to the said fabric fund in future, it was further enacted, that the said canon residentiary, and his successors, who should from time to time after the resignation or other avoidance of Dr. *Madan* become possessed of the said residentiaryship and prebend of *Sawley*, and treasurer'ship, should, from time to time, and at all times thereafter, pay one fifth part of all fines and profits which should be from time to time received, for renewing

renewing the lease or leases of the prebend of *Sawley*, or a fifth part of the rent or rents, receipt or receipts, benefit, or advantage, arising from the said prebend, (except of the ancient reserved rent of 66*l.* 13*s.* 4*d.*, and except of the profits of the rectory of *St. Philips*, annexed to that prebend and^d treasurer^{ship},) unto the dean and chapter for the time being, to be by them applied in aid of the fabric fund. The treasurer^{ship} of the said cathedral church was always held by the prebendary of *Sawley*. The duties of it, (if any,) were very trifling, and were there no emoluments belonging to it. Dr. *Outram* was presented by *St. John's College Cambridge* to the rectory of *Wootton Rivers*, which is a cure of souls, in *June* 1800, and was duly instituted and inducted into the same, and from thence had continued and yet was in possession thereof, if the circumstances thereafter stated did not amount to a cession. On the 3d of *October* 1809, Dr. *Madan* resigned his preferment, by an instrument dated the said 3d day of *October* 1809, attested by *W. Mott*, a notary public, and two other credible witnesses, and preserved in the registry of the Bishop of *Litchfield and Coventry*, whereby Dr. *Madan*, styling himself third canon residentiary of the third residentiaryship founded in the cathedral church of *Litchfield*, for good and lawful causes, did thereby freely and absolutely resign and give up his third residentiaryship, consisting of (besides the sixth part of the dividend of the residentiaries,) the house in the close of the cathedral church of *Litchfield*, thentofore enjoyed by *Samuel Smalbroke D.D.*, deceased, but then by Dr. *Madan*, and the prebend of *Sawley*, otherwise *Sallow*, founded in the said cathedral church, and the treasurer^{ship} of the said church thereto annexed, with the appurtenances, which prebend of *Sawley*, with the treasurer^{ship} and appurtenances, were therein mentioned to be inseparably annexed to the said third residentiaryship by an act, 37 *Geo.* 3., with all the rights, members, and appurtenances

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tenances thereunto belonging, into the hands of the then Bishop,^b and he did thereby totally renounce all his right, title, and possession, in and to the said third residentiaryship, with all the rights, members, and appurtenances thereto belonging, and quitted the same, and expressly receded therefrom by those presents. And, that his resignation might have its full effect, he thereby nominated and appointed *W. Mott*, a notary public, his proxy to exhibit that his resignation to the Bishop, and in his name to desire his Lordship would be pleased to accept the same, and to pronounce, decree, and declare the third residentiaryship, with the said prebend, treasurer'ship, and appurtenances thereto inseparably annexed, to be void of his person to all intents and purposes in the law whatsoever. On the sixth day of *October* 1809, this resignation, at the petition of *W. Mott*, was accepted by the Bishop, and the third residentiaryship was decreed to be void of the person of *Dr. Madan*. On the 2d of *November* 1809, the present Bishop of *Litchfield* and *Coventry* collated *Dr. Outram* to the third residentiaryship in the cathedral church of *Litchfield*, by an instrument under the episcopal seal, bearing that date, expressing that *T. C. Fell* clerk, B. D., commissary for that purpose specially appointed by the Bishop, by virtue of the authority to him committed, did admit and collate *Dr. Outram* in and to the third residentiaryship in the cathedral church of *Litchfield*, as constituted in and by a certain act, 37 G. 3., intitled, &c., consisting of (besides the sixth part of the dividend of the residentiaries,) the house in the close of the cathedral church of *Litchfield*, theretofore enjoyed by *S. Smalbroke* D. D., then deceased, but lately enjoyed by the Rev. *S. Madan* D. D. and the prebend of *Sawley*, otherwise *Sallow*, founded in the said cathedral church and the treasurer'ship of the said church thereto annexed, with the appurtenances, and which residentiaryship became void by the voluntary resigna-

resignation of Dr. S. Madan, and belonged to the donation or collation of the said Bishop of *Litchfield* and *Coventry* in full right of his bishoprick: And that he duly and canonically collated and instituted Dr. *Outram* in and to the same, and invested him with all and singular the rights, members, and appurtenances thereunto belonging, he having first before the said commissary subscribed to the articles, and taken the oaths, and made and subscribed the declaration, which were in that case by law required. Saving always to the Bishop and his successors the episcopal rights and the dignity and honor of the cathedral church of *Litchfield*: and on the 3d day of *November* 1809 Dr. *Outram* was installed into the same. There was no separate collation or induction of Dr. *Outram* to the said rectory of *St. Philip* until his Majesty, by his letters patent, dated the 2d of *October* 1811, having presented to the Bishop of *Litchfield* and *Coventry*, or in his absence to his vicar general, &c. *E. Outram* clerk, D.D. to the rectory of *St. Philip*, in his Majesty's county of *Warwick*, and in that diocese, then legally void by the cession of the last incumbent thereof, and come to the crown by reason of lapse to his Majesty's presentation for that turn belonging, commanding and requiring the Bishop to admit the said *E. Outram* to the rectory of *St. Philip*, and him thereto institute, induct, and invest with all and every th rights, members, and appurtenances thereof, &c.; upon which presentation the Bishop of *Litchfield* and *Coventry* executed an instrument under his episcopal seal, dated the 21st of *November* 1811, purporting that *C. Buckeridge* D.D., commissary for that purpose specially appointed by the Bishop, by virtue of the authority aforesaid, admitted Dr. *Outram* to the rectory of the parish church of *St. Philip*, vacant by the resignation or cession of the last incumbent there, to which he was presented by his Majesty, by reason of lapse to his presentation for that turn belonging,

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ing, as it was asserted; and did duly and canonically collate and institute him in and to the said rectory, and invest him with' all and singular the rights, members, and appurtenances thereunto belonging, he having first subscribed, &c. And did thereby commit unto him the cure and government of the souls of the parishioners of the said parish, and authorise him to preach the word of God in the parish church aforesaid, with the usual saving to the Bishop. At that' time Dr. Outram was possessed of the rectory of *Wootton Rivers*. This present action was commenced on the 9th day of May 1812. The question for the opinion of the Court was, whether the Plaintiffs were entitled to recover.

John Lens for the Plaintiffs,

S. Shepherd for the Defendants.

Lens Serjt. for the Plaintiffs stated, that Dr. Outram, by taking the rectory of *St. Philip* from the crown, by an independant title, had vacated his rectory of *Wootton Rivers*. This did not turn upon its being rated in the King's books as of the value of 8*l. per annum*; but by the canon law, as adopted by the common law, the acceptance of a second benefice with cure of souls vacated the first. *Gibb. Cod.* 903. 3 *Burn. Eccl. Law*, 87. *Co. Dig. Esqlyse. N.* 5. By the council of *Lateran* 1215. 29., "*Si quis beneficium cum curâ recepit, si prius tale habuerit, eo sit ipso jure privatus.*" So, *Holland's case*, 4 *Co. Rep.* 75. 1. *res.* Before the stat. 21 *H. 8. cap.* 13., if one had a benefice with cure, and accepted another benefice with cure, the first benefice was void; but it was not an avoidance by the common law, but by the constitution of the Pope, of which avoidance the patron might take notice, if he would, and might present, if he would, without any deprivation. The only difference the statute makes is, that where the benefice is above the value of 8*l.* in the King's book, then the patron is bound

bound to notice the avoidance; otherwise lapse is incurred. *Vaughan*, 131. If the patron will not present, then, if under the value, no lapse shall incur until deprivation of the first benefice, and notice; but if of the value of 8*l.* or above, the patron, at his peril, must present within six months, by 21 *H. 8.* He professed himself unable to anticipate the argument on which the Defendants would rely.

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Pell Serjt. for the Defendant *Outram*. The statute 21 *H. 8. c. 13. f. 31.* provides that no deanery, archdeaconry, chancellorship, treasurer'ship, chanter'ship, or prebend in any cathedral or collegiate church, nor parsonage that hath a vicar induced, nor any benefice perpetually appropriate, be taken or comprehended under the name of benefice having cure of souls in any article afore specified. The statute of 7 *Ann.* giving the patronage of the advowson of the rectory of *St. Philip* to the Bishop of *Litchfield* and *Coventry*, and enacting that the prebend of *Sawley* shall remain united and annexed to the said rectory of *St. Philip* for ever, makes the latter a benefice perpetually appropriate. The rectory and prebend being made one piece of preferment, it is immaterial whether the prebend of *Sawley* be the adjunct to the rectory, or whether the prebend be the principal, and the rectory the adjunct. The act 37 *G. 3.* unites and appropriates both to the 3d residentiaryship and treasurer'ship. The statute of *Ann* had before directed that all the rectors of the parish church of *St. Philip* should be presented, collated, instituted, and inducted as other rectors, parsons, and vicars are accustomed to be. It had been the custom of the cathedral church of *Litchfield*, that after any living hath been annexed to a prebend, the future prebendaries thereafter take it by collation, not by institution and induction. The title of the act 37 *G. 3.* may be called in aid of the Defendant. It is for augmenting the number

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ber of canons residentiary, for improving the deanery and prebends, and to make further provisions for the canons residentiary. By the 4th section, the canons residentiary so admitted and collated, shall be thereupon installed without any election, in consequence of such admission and collation, and become canons residentiary, and members of the chapter to all intents and purposes; and the third residentiaryship shall consist of, besides the sixth part of the dividend, the house in the close, the prebend of *Sawley*, and the treasurer'ship thereto annexed, with the appurtenances. The former act having inseparably annexed the rectory of *St. Philip* to the prebend of *Sawley*, this act comprehends it under the word appurtenances of the prebend, and is the same in effect as if it had said the third residentiaryship should consist of the dividend, house, rectory of *St. Philip*, treasurer'ship, and prebend of *Sawley*. The case states that there are no emoluments attendant on the office of treasurer, therefore the word appurtenances cannot mean any thing antiently and originally appurtenant to that office, and can only mean what has been annexed to it by the act of 7 Ann. No appurtenances to either of the other residentiaryships are mentioned, whence it may be inferred that the appurtenances are something which is not incident to the residentiaryship merely as such, nor is the word an adjunct to the house, wherefore it may be concluded that it means things appurtenant to the prebend of *Sawley* and not to the house given to the residentiary canon. The clause directing the third canon residentiary to pay to the support of the fabric fund a fifth part of all fines and profits of renewing the prebendal leases, "except of the rent of 66*l.* 13*s.* 4*d.*, and of the profits of the rectory of *St. Philip* annexed to the prebend and treasurer'ship," strongly fortifies this construction, and is an express legislative declaration that the rectory is annexed to the prebend, and so, within

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within the exception of the 31st section. It is therefore immaterial how it became annexed, or what is the operation of the Statute of *Anne*. It is sufficient, that by the act 37 G. 3. it is declared to none to be. Even if the word appertenance were struck out, the rectory would, being annexed, pass as part of the prebend of *Sawley*. The instrument by which Dr. *Madon* resigned the rectory, no otherwise enumerates or passes it, than as part of the appertenance of the prebend of *Sawley*, or of the rights and members thereto belonging, which are inseparably annexed to the third residentiary canonry. If Dr. *Madon* did not vacate it by these terms, he is still rector of *St. Philip's*, and Dr. *Outram* cannot, by accepting a presentation and taking an institution and induction to a living which is not vacant, avoid his former benefice. The presentation, institution, and induction, make no difference; for if he took *St. Philip's* at all, he took it by his collation to the residentiaryship. If the law be such, that when the third residentiary takes a second benefice with cure, the third residentiaryship and the rectory of *St. Philip* become thereby dissevered, this construction renders the act of *Anne* for their inseparable annexation, of none effect.

Lens was relieved from replying, by the Court, who also refused *Pell's* request for a second argument.

MANSFIELD C. J. There may be something unfortunate in the course taken in respect to these preferments, but on the single question, I do not see what doubt can be entertained. It rests upon the first act, which creates this rectory, and directs, that the prebend of *Sawley* shall be conferred by the Bishop of *Lincoln*, at the time being, on such person as shall then be rector of the said church; that the bishop shall collate him to it, in such form and manner as is usual, and

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under such conditions as the statutes of the cathedral church require, to have and to hold the same so long as he shall continue rector of the said new church in *Birmingham*, and no longer; and when, by his decease or any other means, the said church shall become void, the said prebend shall remain united and annexed to the said rectory for ever. No words can be plainer, to shew that the rectory is not annexed to the prebend, but the prebend to the rectory. The act then goes on to say, that the succeeding rector shall be collated to the prebend according to the rules of the cathedral church. What! collated to the prebend, when the prebend is annexed to the living? He is to be collated; this would be unnecessary, if he has a right to it by reason of his character of rector. So far then it is clear: the rector of *St. Philip's* could not become the rector but by the course of collation, or presentation, institution, and induction; and when he has obtained that, he has a right to call on the bishop to collate him to this prebend of *Saudey*. Next, in the 37th year of *Geo. 3.*, an act is passed, not to explain the act 7 *Ann.*, and it does not refer to that, but the act 4 & 5 *Ann.* It purports to be an act to explain that act, and to make further provision for the canon's residentiary, and an addition to the fabric fund. In that act are five clauses, on some of which the counsel for the Defendants endeavours to argue that the prebend is not annexed to the rectory, but that the rectory is, what he calls appropriated, to the residentiaryship. One of them enacts, that the third residentiaryship shall consist of, besides the sixth part of the dividend of the residentiaries, the house in the close of the cathedral church, then enjoyed by *Dr. Madon*, and the prebend of *Saudey*, with the treasurer's shop of the said church, and then annexed, with the appurtenances, which shall be and is thereby informally annexed to the third residentiaryship. If it had been intended to enumerate all the matters

matters of which the third residentiaryship should consist, and to include *St. Philip's*, one would suppose the act would have expressed it by name; but in speaking of the component parts of the prebend of *Sawley*, the act does not mention *St. Philip's*. Next comes the clause respecting the fabric fund, which enacts that the third canon residentiary who shall, after Dr. *Middon*, become possessed of the third residentiaryship and prebend of *Sawley* and treasurership, shall at all times pay one-fifth part of the rents, receipts, benefit, and advantage arising from the said prebend, except of the ancient reserved rent of 66*l.* 13*s.* 4*d.*, and except of the profits of *St. Philip's* in *Birmingham*, annexed to the said prebend and treasurership, in aid of the fabric fund. What does this say? a fabric fund is to be created, and a contribution is to be made out of the profits of the prebend, with an exception of a particular thing; and a doubt probably occurred to those who penned the act, whether this might not be thought to extend to the rectory of *St. Philip's*, for preventing which, the act mentions it. One cannot suppose from this mere recital, that it was intended to repeal the statute of 7 *Ann.*, this act not even alluding to it, it does not look at all to the union of the rectory and prebend, nor at all go to undo that which had been most formally done by that act. No one ever yet heard that a valuable rectory would pass under the word "appurtenances" to a prebend or treasurership; and as there does not appear to have been the least advertence to the 7th *Ann.*, or the purposes of it, the word "annexed" being used only in its ordinary sense, and not in its legal sense, I cannot see even so much of a doubt as to make it worth while to delay the parties for another argument.

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The rest of the Court concurring.

Judgment for the Plaintiffs.

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BOWERBANK and Another v. MONTEIRO, Executrix of P. G. MONTEIRO, deceased.

An executrix gave an acceptance for a debt due from her testator, taking in engagement from the drawer, to renew the bill from time to time, until sufficient effects were received from the estate of the testator. Held that this meant sufficient effects in the ordinary course of administration; and that she had not precluded herself from first applying assets to pay 3000*l.* to trustees for her own use in discharge of a bond given by her husband before marriage to that effect, before she paid the acceptance.

THIS was an action upon a bill of exchange at 65 days after date, drawn by the Plaintiff on and accepted by the Defendant as executrix to *P. G. Monteiro Esq.* deceased, for 434*l.* 16*s.*, expressed to be for value received by the deceased. The Defendant pleaded the general issue. On the trial of the cause at the sittings after *Trinity* term 1812, before *Mansfield C. J.*, the Plaintiffs proved the acceptance, and that the consideration was a debt due for goods sold by the Plaintiffs to the deceased. The Defendant in answer to the action gave in evidence the following writing, signed by the Plaintiffs, and given her when she accepted the bill. "Received, 28th May 1808, of *E. A. Monteiro*, executrix of *P. G. Monteiro Esq.* deceased, an acceptance for 434*l.* 16*s.*, due 4th August next, which we promise to renew from time to time until sufficient effects are received from the estate of the said *P. G. Monteiro.*" Hereupon the Plaintiffs contended, on the authority of *Hodre v. Graham*, 3 *Campb.* 57., that this agreement could not be set up to defeat the Defendant's own acceptance; but that if it constituted any defence at all, it ought to have been pleaded specially, and could not be received in evidence on the general issue. *Mansfield C. J.*, however, received it; and the Plaintiffs then proved that assets to a greater extent than the amount of the bill in question had come to the Defendant's hands; to rebut which, the Defendant proved the payment by her of several simple contract debts to other creditors, and also gave in evidence a bond executed by the testator by way of settlement on the Defendant, previous to her marriage with him, whereby he bound his executors to

pay 3000*l.* as a provision for herself, to trustees for her use, within six months after his decease, and she claimed to retain and apply the assets to the discharge of this sum, in preference to the Plaintiff's bill: the Plaintiffs contended, that the meaning of the agreement was, that the very first effects which should come to the Defendant's hands, should be applied in discharge of her acceptance without regard to the order of marshalling the assets, or that at least she had thereby waived her own priority: they were unable to prove assets sufficient to cover this sum, and leave a surplus for the payment of their bill. * *Mansfield C. J.* thought that the Defendant could not be permitted to retain, in derogation of her own contract with the Defendants, and the jury under his direction found a verdict for the Plaintiff for the amount of the bill, with liberty for the Defendant to move to enter a nonsuit.

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Accordingly *Pell Serjt.* in *Michaelmas* term, 1812, obtained a rule *nisi* to that effect, against which *Woughan Serjt.* now shewed cause. He relied first upon *Heare v. Graham*, as an authority that the effect of the Defendant's acceptance could not be controuled, by the Plaintiff's contemporaneous undertaking to renew the bill. 2dly, That the agreement must be taken literally, and confined to the Defendant's receipt of any effects whatever, without considering whether in the ordinary course of administration they would be applicable to the discharge of this bill; otherwise the defendant, who had not communicated to the Plaintiffs her intention to retain, or the existence of this settlement, would be enabled to effectuate a fraud on them; for if they had sooner known the facts, they might ere this have sued and obtained a judgment upon their debt; at least, if she had paid other simple contract creditors in preference to

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the Plaintiffs, she was thereby estopped from setting up her claim under the settlement.

Pell, in support of his rule. This is no fraud. The meaning of the agreement is, that when the Defendant has assets which in due course of administration are applicable to the purpose, then and not before, she shall discharge this acceptance.

MANSFIELD C. J. The only doubt is, whether the debt to the Defendant is to be considered in the like nature as other debts due to other creditors. There is no doubt but that bond debts to other bond creditors should be first paid. My Brothers think there is no distinction between those and the debt to herself: but she never told the Plaintiffs she had a settlement of 3000*l.* to satisfy.

HEATH J. No distinction is to be made under these circumstances.

CHAMBER J. It is an advantage to the Plaintiff, as it now is; for the Defendant gives them a preference over other creditors in equal degree; she certainly cannot avail herself, in account with the Plaintiffs, of the payments she has made to other simple contract creditors; but it would be a grievous disadvantage to her if she was bound by this agreement to commit a *devastavit*, for which she is personally liable to others.

GIBBS J. In *Hoare v. Graham* the evidence of the undertaking to provide for the bill was rejected, merely because it was parol, and could not be received to control written instruments against an innocent indorsee. But a party may, by one writing, change or contradict another, and there is no innocent indorsee here. The only question is, on the construction of the instrument; the

the words are, "until sufficient effects are received;" which means sufficient effects according to the subject-matter. I think the true construction is, to pay when she shall receive assets legally applicable to this purpose; and the only question, therefore, is, whether there is any distinction between her bond debt and other bond debts. I can discover no such difference, and it is no disadvantage to the Plaintiffs; for if they had sued on their original debt, the bond debt for 3000*l.* might have been pleaded; and as it now stands, it is an advantage to the Plaintiffs; for the bill gives them the same advantage as a judgment of assets *quando acciderint*. If she had paid so many simple contract debts as would pay off the 3000*l.*, and something more, the Plaintiff would have a right to recover the surplus above the 3000*l.*: but she has a right to protect the payment of as many simple contract debts as her bond will cover.

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Rule absolute for a Nonsuit.

JONES and Another v. BOWDEN and Another.

May 22.

THIS was an action upon the case, for a deceit in the sale of some pimento. The first count of the declaration stated a warranty that the pimento was sound, and in

It being usual in the sale by auction of drugs, if they are sea-damaged, to ex-refs

it in the broker's catalogue, and drugs which are re-packed, or the packages of which are discoloured by sea-water, bearing an inferior price, although not damaged, the Defendants, who had purchased some sea-damaged pimento, re-packed it, and advertised it in catalogues, which did not notice that it was sea-damaged or re-packed, but referred it to be viewed, with little facility, however, of viewing it: they exhibited impartial samples of the quality, and sold it by auction. Held that this was equivalent to a sale of the goods, as and for goods that were not sea-damaged, and that an action lay for the fraud.

And though the declaration stated also that it was sold as and for pimento of good quality and condition, whereas the samples shewed that it was dusty and of inferior quality, yet the jury having found for the Plaintiffs, the Court refused to set aside the verdict.

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good state and condition, and free from damage. - The second count stated that the Defendants, well knowing that divers, to wit, 20 bags of the pimento, had been, and were sea-damaged, and in a bad state and condition, and that divers, to wit, 81 bags thereof were also damaged, and in a bad state and condition, did, nevertheless falsely, fraudulently, and deceitfully represent the same 101 bags of pimento to be sound, and in a good state and condition, free from damage, and thereby induced the Plaintiffs to buy the same, &c. whereas in truth the pimento at the time of the sale and representation was not sound, &c. The third count alleged that the Defendants were desirous of selling, and put up to sale by the candle, certain other pimento, whereof divers, to wit, 20 bags had been and were sea-damaged, and in a bad state and condition, and divers, to wit, 81 bags, residue thereof, were also unsound and damaged, in a bad state and condition, and of little value, nevertheless the Defendants, well knowing the premises, did fraudulently and deceitfully sell the same as and for pimento of sound quality, and in a good state and condition, and not damaged, to the Plaintiffs. The cause was tried at *Guildhall*, at the sittings after *Trinity* term 1812, before *Mansfield* C. J. the evidence was, that the Defendants, who were brokers, had a sale by candle on the 29th day of *March* 1810, and had previously circulated a catalogue of sale, in which were included "187 bags of pimento, bonded," and at the foot of the catalogue was inserted a declaration as follows: "The goods to be seen as specified in the catalogue, and remainder at No. 36. *Cambridge-street*. The Defendants had, about two months before, purchased the pimento in question, for their principal, at a sale comprehending both damaged and undamaged pimento, under a catalogue which stated this to be sea-damaged. The purchaser had since re-packed it. Pimento, although not damaged,

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maged, yet if it has been re-packed, or is contained in bags that have been discolored by sea-water, produces a less price in the market than pimento of the same quality which has not been repacked, nor the bags discolored, either of those circumstances bringing it into discredit. The Defendants had drawn from the bulk, for the purposes of the present sale, samples which were impartially taken, and were exhibited to the bidders, whereby it appeared to be dusty and of an inferior quality, but it did not thereby appear that it had been sea-damaged, neither did it, nor can it ever, appear by the sample whether pimento has been re-packed or not. The Plaintiffs became the purchasers. At the time of this sale, good pimento was worth about 14*d.* per lb., and the price given for the article in question, which was about 13*d.* was no more than a reasonable price for it, after taking into consideration the fact that it had been sea-damaged and re-packed. Pimento is sometimes sold with an express warranty of soundness, but when damaged pimento is offered to sale by auction, it is usual in the trade to state that it is damaged: and if nothing is added with respect to its quality, it is supposed to be sound. The goods in question were offered to sale by the auctioneer without any addition or comment, and though the advertisements stated that it was to be seen at the Docks, they were never distributed until the day next before the sale, and no one in fact then inspected the goods. For the Plaintiffs it was urged, that here was a defect known to the seller, but unknown to the buyer, and one which the buyer had no reasonable means of discovering, and the question was whether that were a fraud, and if it were a fraud, whether it could be recovered for in the form of declaration above stated; and the cases were cited of *Parkinson v. Lee*, 2 *Rast*, 314, and *Mellish v. Motteux, Piche, N. P.* 115. The Defendants insisted that they were not liable. The jury said, that the state of the goods ought to have been

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been communicated by the Defendants to the Plaintiffs, and found a verdict for the Plaintiffs for 423 $\frac{1}{2}$ the price they had given, subject to the two points reserved, whether the action could be at all maintained under these circumstances, and if it could, whether it could be maintained on the 3d count.

Leut Serjt., in *Michaelmas* term 1812, obtained a rule nisi to set aside the verdict, and enter a nonsuit.

Shepherd and *Vaughan* Serjts. now shewed cause. They relied on the evidence as having proved a custom in the trade to declare at the time of sale that the goods were damaged, when such was the case, and insisted that therefore the passing over that fact in silence was equivalent to a representation, nay farther, it was even a warranty, that the goods were sound. Every circumstance which lowers the value of the goods in the market is a defect which ought, under that custom, to be disclosed by the seller. It was clear that the defect was in this case known to the seller. The buyer had not the means of discovering by the exercise of ordinary diligence the facts that the pimento had been sea-damaged and re-packed. The sample would not shew it. The reference to the goods bonded in the Docks was nugatory, for bonded goods are surrounded with such a mass of other goods, that it is impracticable to inspect them. The jury, in saying that the defects ought to have been communicated, had found that there was fraud in fact. The Plaintiffs were therefore entitled to retain their verdict on the third count, which alleged it to be done *scilicet*, it not being pretended that there was any ground to arrest the judgment on that count.

Lees and *Boss* Serjt. *contra*. 'The mere silence is neither a warranty, nor even a representation, for the Defendants sell

sell by a printed particular, referring to the place where the goods are to be inspected; this brings the case within the principle of *Bagchale v. Waters*, 3 *Campb.* 154. *Mellish v. Motteux*, and *Pickering v. Dowson*, *ante*, 4. 779, viz. that where the buyer has an opportunity of examining, the seller is not bound to disclose the defects. The catalogue stating that the pimento was bonded, referred the bidder to the Docks for an inspection. If such part as was there was difficult to be seen, yet the Plaintiffs might have inspected such part as was in *Camomile-street*. Mere silence, where the party is not called on to declare, is not a representation. *Aliud est tacere, aliud celare. Cu. De Off. lib. 3. 69. pag. 383. Steph.* The doctrine that a found price is evidence of a warranty of a horse, is long since justly exploded. It was competent to the purchaser to call for another criterion of the quality than the sample, or to make enquiries respecting such qualities as the sample did not disclose, but he makes no enquiries. The general rule is, that where there is no express warranty, unless the seller practices some trick, the maxim *caveat emptor* applies. The evidence of the practice to mention the defect when drugs were damaged, did not amount to proof of an uniform custom in this trade to disclose all faults: it was in evidence that the brokers frequently sold drugs with an express warranty, which would be superfluous if there were an invariable implied warranty, nor did the Plaintiffs at the trial rely on that special usage, otherwise the fact would have been more closely examined into. There is no count on which the Plaintiffs can recover; if there be any ground of action at all, the case must rest on the sort of duty of which a breach is intended to be averred by the third count, but that count alleges a fraud founded on facts entirely different from those which exist. It does not state that, which is the only subject of complaint, the concealment by the sellers of the technical defect of

re-

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re-packing and stained bags. The allegation therein that the Defendants sold the pimento as and for pimento of a sound quality, and in good state and condition, is disproved by the evidence, which was, that the Defendants sold it by the sample, and that the sample shewed it to be dusty and of inferior quality. If that count could be supported by such evidence, a purchaser would have, upon discovery of the slightest defect in the quality of the goods, the full benefit of a warranty, where a warranty had never been given.

MANSFIELD C. J. If in this case any ground had been laid by affidavit to shew that the Defendant had been at all surprised or misled as to what might be proved against him on this third count, we might have thought it proper to send it again to a jury; but the case was not moved on the ground of surprise, and there is no such evidence; and the jury having stated that they thought the Defendants ought to have disclosed the sea-damage, though neither the Defendants particularly cross examined, nor did the Plaintiffs expressly examine their witnesses to prove or disprove the custom; and there being this strong circumstance, that the Defendants bought the goods for sea-damaged, the distinction between pimento that was sea-damaged, and that which was not sea-damaged, being perfectly known, I think it would be too much to deprive the Plaintiffs of the benefit of this verdict. Since it is usual to mention the fact if pimento is sea-damaged, when this is not mentioned, as such, how would any one understand the catalogue, having simply the word pimento, but not particularized as being sea-damaged? As to the sample, it is in evidence that from that no judgment can be formed respecting the sea-damage, the knowledge of which can only be had from inspecting the bags. These Defendants then do, as is alleged in the third count,

count, sell it as pimento not sea-damaged. There are, it is true, in that allegation, the other general words, of sound quality, and in good state and condition, but they do not seem to me so to vary the count, as to prevent the Plaintiff from recovering on that count, in a case where the Defendants, upon selling sea-damaged pimento, have not made the representation which is usually made by persons selling pimento of that description.

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BOWDEN.

HATH J. concurred, and mentioned a trial before himself on the home circuit, in an action on the sale of some sheep sold as stock; and the evidence was, that by the custom of the trade, stock were understood to be sheep that were sound; and he directed the jury that it amounted to an implied warranty that they were sound, and that direction was never questioned when the case afterwards came before the Court of King's Bench.

CHAMBRE J. was of the same opinion.

GIBBS J. The justice of the case is with the Plaintiffs, but I do certainly doubt whether the evidence meets any of the counts in the declaration. For in all the counts it was stated either that the pimento was represented or warranted sound, or that it was put up to sale as of sound quality, and in good state and condition, and not damaged. However, as my Brothers think differently, I distrust my own opinion, and the rule must be

Discharged.

1813.

May 23.

MENCE V. GRAVES.

The insolvent act 51 G. 3. c. 125. is a bar to an execution against the person of the grantor of an annuity, in covenant for instalments accruing after the Defendant's discharge under that act.

THIS was an action of covenant upon the grant of an annuity. The Defendant pleaded that the Plaintiff ought not to maintain his action, to have execution for his damages adjudged to him in this behalf on or against the person of him the defendant, because he was actually a prisoner in his majesty's prison of the Marshall of Marshalsea, at the suit of *M. Sanderfon* on 1st May 1811, mentioned in a certain act 51 G. 3. c. 125, setting out the title, and that afterwards, to wit at a general quarter sessions of our lord the king, holden by adjournment at *St. Mary Newington* in and for the county of *Surry* on Monday the 19th August 1811, before certain then justices of our said lord the king, assigned to keep the peace of our said lord the king in and for the county of *Surry*; the Defendant was duly discharged according to the said act, and that the said indenture was made, and debt contracted before 1st May 1811. To this plea the Plaintiff demurred, and the Defendant joined in demurrer.

Shepherd Serjt. in support of the demurrer. The insolvent act only says the creditor shall be entitled to receive a dividend in such manner, and on such terms as if the debtor had become a bankrupt; but the bankrupt laws do not discharge a bankrupt from payments of an annuity secured by covenant, and accruing due after his bankruptcy.

Per Curiam, The statute 49 G. 3. c. 121. s. 17. does discharge him therefrom; *Cowley v. Buffell*, ante 460.

Judgment for the Defendant.

Vaughan Serjt. in support of the plea.

1814.

RASHLEIGH, Demandant; LEE, Tenant, SMITH,
Vouchee.

May 25."

JENS Serjt. moved to amend a recovery, by inserting in the several proceedings after the words "county of," and before the word "*Southampton*," the words "the town of," so that it should stand "the county of the town of *Southampton*," the premises being within the town, which is a county of itself.

Original writ and other proceedings in a recovery amended by inserting the county of the town of S. for the county of S.

The Court considering it merely as a clerical misprision, and not as a substitution of one county for another, which they had often refused, permitted the amendment.

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May 25.

SEWELL v. The Royal Exchange Assurance Company.

The owners of a vessel, who by performing the legal stipulations of a charter-party, provoke confiscation by the illegal and piratical act of a foreign state, do not thereby avoid their assurance.

If a *British* subject purchasing, by the king's licence, a hostile built vessel, which is not entitled or required to have a *British* register, charters her on a voyage out to the *Indies* and home, and sends her to sea with a crew, in which there is not the proportion of *British* mariners required by stat. 12 Car. 2. c. 18. s. 14: this does not avoid a policy on the outward part of the voyage, because *non constat* that the owners will not obtain a due proportion of *British* seamen before her return.

Nor is it an objection to the same policy, that she is foreign built; for held, that the stat. 49 G. 3. c. 60. s. 1. authorizes the ships of any country in amity, by the king's licence, to bring foreign produce to *England*, though not *English*-built or registered, contrary to ss. 3 & 10 of the stat. 12 Car. 2. c. 18.; and that a ship purchased by a *British* subject from an enemy with licence, is the ship of a country in amity; and *non constat* that such a licence will not be obtained before the act of importation is complete.

And for the same reasons, the insurance on the homeward part of the voyage was not illegal.

If a master sails under a charter-party, stipulating for a voyage of which a part is illegal, *Seemle* that this does not prevent his insuring on, nor subject him to forfeiture for the part antecedent to the illegal act, for as he cannot be compelled to perform, nor enforce the payment of freight on the illegal part of the adventure, it may be presumed that he will abandon it.

The

The Cause was tried at the sittings after *Trinity* term 1812 before *Gibbs J.*: it appeared that the ship was *Norwegian*-built, and had been purchased by the Plaintiffs of *Heuch* the master, who was a subject of *Denmark*, a country then hostile, under a licence from his majesty to purchase of an enemy. She had on board *Danish* papers, colours, and crew, with which, as well as the same master, and the licence for the purchase, the plaintiffs sent her out in ballast on the voyage chartered; the bill of sale from *Heuch* to the Plaintiffs was not sent out on board her, nor is it usual in the case of purchasing a vessel from an enemy, to send out the bill of sale on board her. On the ship's arrival at *St. Michael's* the governor refused to let her enter the port, or receive a cargo there, and ordered the master to proceed to *Tercera*, where the *Portuguese* governor-general resided, to obtain permission to land at *St. Michael's*. This the master refused to do, assigning as his reason that it would be a violation of his charterparty; and he intended to lie in the harbour during the stipulated time for his taking in a cargo, but was soon after arrested by the governor and detained four months a prisoner, and a *Portuguese* pilot, master, and crew were put on board his ship, who took her to *Tercera*. There was at that time peace between *Denmark* and *Portugal*. The master exhibited all the ship's true papers; which contained evidence that she was *British* property; it was objected to him that he had not *British* papers and a *British* certificate of registry; he assigned as the reason, that the ship was not *British*-built, and therefore not entitled to the latter, and consequently she ought not to have the former, yet the *Portuguese* authorities would not give credit to that reason, but decreed sequestration of the ship, on the ground that the want of *British* registration rendered her obnoxious thereto under a decree of 9th *May* 1811 of the *Portuguese* government, and the 5th

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article of the treaty between *Portugal* and *Great Britain*, set forth in *Coben v. Hannam*, *post.* 5. 101. For the Defendant three points were made. First, that the Plaintiff could not recover on the homeward policy, because under the navigation act, 12 *Car.* 2. c. 18. *ss.* 13. & 14., requiring three-fourths of the crew to be *British* subjects, it was illegal to import a cargo of fruit from *St. Michael's* into *England* with a *Danish* master and crew. And that since the charter-party, which was in evidence, proved that the voyage from *London* to *St. Michael's*, and thence back to *London*, was one and entire, the illegality vitiated as well the policy on the outward voyage as the other. Secondly, that it was unlawful for a *British* subject to use the *Danish* flag, because it was hostile. Thirdly, that the loss had happened through the misconduct of the Plaintiff's agent the master, for that he ought, for the general interests of all concerned, to have obeyed the orders of the governor of *St. Michael's*, and have gone to *Tercera*. *Gibbs J.* not doubting that the homeward cargo was illegal on the navigation act, reserved the point without any discussion how that statute applied: he was of opinion, that according to the case of *Wilson v. Marriott*, 8 *Term Rep.* 31. the homeward voyage did not contaminate the outward voyage; he was of opinion that the second objection could not avail; and upon the last point he was of opinion that the master had adhered to the strict line of his duty; and the jury, coinciding with him, found a verdict for the Plaintiffs on the policy on the outward voyage, with liberty to the Defendants to move to set aside the verdict and enter a nonsuit.

Accordingly *Shepherd Serjt.*, for the Defendant, in *Michaelmas term* 1812, moved for a rule nisi, in the alternative, either to enter a nonsuit or have a new trial, upon the grounds before mentioned, and upon the further

further ground that the ship was not properly documented, for that she ought to have been furnished with papers completely corresponding to the character either of a *British* or a *Danish* vessel. The licence to purchase could not authorise the *British* purchaser legally to assume the *Danish* character; *Denmark* being then at war with *Great Britain*, the underwriters were entitled to require that she should bear those marks of *British* ownership which would secure her against *British* capture. To hold that a *British* subject may legally navigate a vessel of enemy's built, would be to give to the ships of an enemy's country all the privileges which the *British* register acts were designed to restrict to our own.

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GIBBS J. The master being asked why he had not *British* colours and *British* papers, said, I cannot have them because I have not a *British* register. He stands on his strict rights. He says, I will do nothing to endanger my owner, I am a neutral, and I have a right to enter your port. The master really communicated the true facts of the case when she was searched, and says, I cannot go off because of my charter-party: the other says, Then I will seize you. We think then each party stands on his strict rights, and we are now to consider the strict point of law, not the question whether it would have been more prudent in him to go to *Tercos*, but whether he acted *bona fide*. We do not, however, quite agree with the Defendants on the question of imprudence; but it is for the underwriters to shew that the owners did something which made it legal for the *Portuguese* to seize and condemn the vessel, and unless the seizure is legalized by any illegal act done on the part of the owners by the captain, the seizure is illegal, as we think that here it is, and the assured is entitled to recover.

Upon the other points, the Court granted a rule nisi.

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Lens, Vaughan, and Pell, Serjts), in this term shewed cause against this rule. The outward and homeward voyages must be considered as distinct; and therefore, as it is not pretended there was any thing illegal in the outward voyage considered by itself, and the homeward voyage never commenced, there is no pretence for a nonseizure. Admitting that by the 14th section of the navigation act it is illegal to import produce from the *Azores*, unless the master and three-fourths of the mariners are *English*, nothing in the charter-party compelled the ship to return to *England* with the same *Danish* master and crew: there is no evidence that the vessel might not, after having taken in such a cargo which rendered it necessary, have returned to *England* with a crew of the description required. In the case of *Bird v. App^l ton*, 3 T. R. 565., where a voyage was undertaken from *London* to *Canton*, and back to *Hamburgh*, the ship having taken an illegal cargo of cotton from *Bombay* to *Canton*, it was urged that the homeward voyage from *Canton*, being part of one entire voyage round, was thereby rendered illegal and incapable of being insured, but the Court held that the homeward voyage to *Hamburgh* could not be affected by the former outward voyage. *Wilson v. Marriott* is still stronger for the Plaintiffs. To render the insurance illegal, therefore, the prohibited act must occur in the course of the voyage insured, and consequently, even if it were in the principal case admitted that the vessel was destined to return with the same crew, yet the outward voyage would not be illegal. To make it such, it must be contended that, if the ship had returned to *England* with a crew of which three-fourths and the master were *English*, she would nevertheless continue subject to seizure and forfeiture, on the ground of the illegal intention which had at a former period subsisted, and been since abandoned, that she should return with a *Danish* crew.

This

This is like a contemplated deviation, which, if not effected, does not avoid a policy. The third section of the navigation act is not applicable to the present case. The Plaintiffs are at least entitled to recover back their premiums on the homeward policy, on the ground that the voyage thereby insured never had an inception, and the verdict on the outward policy stands untouched.

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Shepherd and *Best* Serjts., in support of the rule. The charter-party shewed that the voyage out and home was entire, and for one entire freight; the inchoate right to freight, therefore, attached as soon as the vessel left the *Thames*. She was as much prohibited from sailing with that crew in quest of that cargo, as from arriving with it, and the Plaintiffs cannot, by effecting several policies, sever one part of the adventure as innocent from that which is illegal. *Bird v. Appleton* is a case where the outward and homeward voyages were expressly found to be distinct. In this case the voyage is proved by the charter-party to be a voyage round. It may be admitted that a vessel might innocently sail with an outward cargo, notwithstanding that after she had discharged it, she might take in a contraband cargo for her return. The homeward voyage would be clearly illegal, though the vessel would not be subject to seizure in her voyage out. *Wilson v. Marriott* is inapplicable, for it did not there appear that an illegal voyage was resolved on when the ship sailed from *America*. It would not in this case suffice to change the master and crew at *St. Michael's*, as has been suggested, because by s. 3. of the navigation act a *Danish*-built ship, though *British* owned, cannot bring home produce from a *Portuguese* island to *England*. The *Portuguese* treaty only adopts such *British* vessels as are within the navigation act. By s. 10. of 12 Car. 2. c. 18.,

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no ship can be considered as *British* owned, that has not a *British* register. The assured could not send her out from *England* with an intention to change her built in the course of the voyage, as they might her crew, therefore in sailing from *England* with intention to bring a cargo of produce from the *Azores*, she necessarily failed upon an adventure illegal from the beginning, considering her as an hostile ship, in whose behalf the King's licence, if obtained, might dispense with the disability of the hostile character. If she had sailed with her cargo from *St. Michael's* on the homeward voyage, and been lost, would the argument hold, to say that her voyage was not illegal because a licence might possibly have been obtained for her before she would have entered the *Thames*? The navigation acts had two great objects, to increase as well the shipping as the seamen of the country, and no licence from the crown could dispense with the disabilities arising from her built.

This point not having been taken at the trial or on the motion for a rule *nisi*, the Court permitted it to be now spoken to on the part of the Plaintiffs.

Lens. If the vessel is not entitled to the privilege of *British* registration, she must be considered as an alien ship, and then *non constat* that a licence to import would not have been obtained before she came home with her cargo. The same argument would have applied in the case of *Coken v. Hanham*, *post.* 5. 101.; but it has always been conceived that ships thus purchased, though not wholly to be dealt with as *British* ships, are yet to a certain degree capable of being dealt with by *British* subjects. *Leng v. Duff*, 2 *Bos. & Pull.* 209.. it was held that a foreign-built ship *English* owned, was not within the convoy act, 38 G. 3. c. 76. s. 4., which extends only to "ships required to be registered," be-

cause it was not required by any of the register acts to be registered as a *British* ship: and Lord Eldon C. J. concludes, "It is not said that ships not registered shall not be navigated or owned by *British* subjects; a *British* owner of a foreign-built ship may engage in neutral trade, and will be liable to the alien duties; but it was not the policy of the legislature to prevent *British* subjects from employing foreign ships in neutral trade, in as ample a manner as they can be employed by aliens." He at first admitted, that he had found no statute which relaxed the navigation acts as to the built of the ship; but afterwards, on a suggestion from the Court, argued that the statute 49 G. 3. c. 60. f. 1. relaxes the navigation acts as to the built of the ship, and legalizes importation from any part of *Europe* or *Africa* in ships either *British* or belonging to any country in amity with his Majesty, and this vessel must at least be considered as of the latter description. (a)

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Cur. adv. vult.

MANS-

(a) It is with the greatest diffidence that a doubt is stated, whether the statute cited, and which was not detailed at length upon the argument, be exactly applicable to the question on the built in the principal case. This act seems to have been passed chiefly for the purpose of cluding the continental system, by permitting goods to be brought to *England* from commercial depôts, (whither they were to be carried from their place of growth and deposited, for the purpose of acquiring a new national character, or of being close at hand for a shorter voyage to *England*;) by the same ships and persons which might lawfully have imported the same goods

direct from their place of growth; but it seems not to extend to the present case. It in substance enacts, that "during hostilities, it shall be lawful, under any order of council, to import into the *United Kingdom*, from *Europe* or *Africa*, in any *British* ship, or ship belonging to any country in amity with his majesty, in any manner navigated, (not in any manner built,) any goods and commodities, which may be lawfully imported, being the growth or produce of any country, on payment of the same duties, and subject to the same rules, regulations, and restrictions, penalties, and forfeitures, as the same would be subject to, if import d directly from the place of the growth

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MANSFIELD C. J. on this day delivered the opinion of the Court. The question is, whether on the statute and the law, this insurance is, as has been urged, illegal. A great deal of the argument need not be adverted to, considering the view in which the Court feels the question. Much of the argument was, that this was an illegal voyage, not only in the contemplation of the master, but that he was bound by the charter-party which he had entered into, to pursue it at all events. It is not necessary now to decide what would be the consequence of a person entering into a charter-party for a voyage out and home, the voyage home being illegal, and of his separating it into two voyages by insuring the outward voyage separately, and the homeward voyage separately; the Court are not here called upon to decide whether in that case the outward voyage is part of the homeward and illegal voyage. If there were a clear *locus penitentie*, it would be unnecessary to decide that the outward voyage was illegal; for if the captain, getting out thither, discovered that he was on an illegal charter-party, and that he could not enforce the payment of his freight, he might go off to any other part of the world; but it is not necessary to decide this question in the present case: for we think that the ground taken by the Defendant fails, and that the homeward voyage is not necessarily an illegal voyage. This vessel clearly is not entitled to the

growth or produce of such goods or commodities respectively, *in the same ships or vessels respectively.*" The effect of the act as applied to this case, seems to be, that this ship, being neither *British* registered, nor *Portuguese*, but belonging to a country in amity, may, however navigated to the crew, import goods, (in this case fruit,) from *St. Michael's*, subject to the same pe-

nalities and forfeitures, as, in case that act had not been made, the same ship and goods would be subject to, if imported directly from *St. Michael's*, that being the place of their growth, in the same ship; i. e. in a ship neither *British* registered or *Portuguese*; which penalties were, the forfeiture of the ship and cargo under the navigation act.

privileges of a *British* ship, but is to be considered as an alien ship. As such, she could not come to *England* with the cargo in question; were it not that by the stat. 49 G. 3. c. 60., his majesty has power to license ships to a trade directly contrary to the act of navigation, i. e. to authorize alien ships to bring home this sort of cargo. *Non constat*, that this captain would have performed this voyage without obtaining such a licence. If there were any officer in the *Azores* authorized to grant it, the master might obtain it there: if not, he might wait till such a licence was sent out to him from *England*. It does not appear to us by any evidence that the charter-party bound him to sail on his homeward voyage, before he should obtain this licence. The sort of licence to be obtained, is a licence to import; therefore it was not necessary to obtain it till just before the act of importation: it does not refer to the act of sailing homeward, but of bringing in the goods; and therefore we are of opinion the rule must be

Discharged.

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SCOTT and Another, Assignees of STARKE, a
Bankrupt, v. JONES.

May 7.

THE Plaintiffs declared in trover for an agreement in writing dated the 23^d day of *January* 1811, made between *J. Jay* and *R. Starke*, the bankrupt, whereby, amongst other things, *Jay* agreed to let to *Starke* a piece of ground situate in *Great Suffolk Street* in the parish of *St. George the Martyr, Southwark*, at and under a certain rent, and on certain terms, therein particularly mentioned

ment, *semble* that it is not necessary to give the Defendants notice to produce it, but that it may be proved by description.

Trover lies for an unstamped agreement, if it can, upon payment of a penalty and stamp-duty, be stamped and rendered available.

In trover for a written instru-

and

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and whereby, amongst other things, *Starke* agreed to build on the ground two substantial brick dwelling-houses not inferior to third rates, and for the term of 57 years from *Midsummer* then last, to be subject to all the covenants contained in the corporation of the bridge-house estate; and *Jay* agreed with *Starke* that he should have a lease of the ground three months after *Jay* should have obtained his lease of the corporation of the bridge-house estate, and *Starke* should have completed the houses, the said agreement being then and there in full force, and of great value, to wit the value of 500*l*. Upon the trial of the cause at the *London* sittings after *Trinity* term 1812, before *Mansfield* C. J., the case was, that *Starke*, who was a builder, had, after making the agreement in question, become a prisoner on mesne process for debt, and had afterwards deposited the agreement with the Defendant as a security for the price of timber which the Defendant had furnished him in order to carry on his building on the demised premises, and had afterwards executed an assignment thereof to the Defendant by way of mortgage, the houses being partly erected. *Starke* having become bankrupt by continuing two months under that imprisonment, so that the act of bankruptcy was inchoate before the deposit and assignment, the Plaintiffs, who were his assignees, now brought trover for the agreement; in consequence of notice from the Plaintiffs, the Defendants produced the agreement at the trial, when it appeared to be of that description which requires a sixteen shilling stamp under the statute 48 G. 3. c. 149. schedule 1. part 1. *Agreement*, but to be unstamped, whereupon *Mansfield* C. J. refused to receive it in evidence, holding it inadmissible for any purpose whatever, and, conceiving that the action could not be maintained unless the instrument were produced and read, nonsuited the Plaintiffs.

Best Serjt. in *Michaelmas* term 1812, moved for a rule nisi to set aside the nonsuit and have a new trial. He urged that this was an action against one who was no party to the agreement, the Plaintiffs wanted to get it from him in order to have it stamped, that they might enforce it against the party to it. Neither this Court, nor a court of equity had jurisdiction to make the Defendant, being a third person, produce the paper to be stamped. The reasoning in *Hawkeswood's* case, 2 *East, P. C.* 955. was applicable here: this was a misapplication of the stamp laws; they were only meant to go so far as to prevent the instrument from being evidence to substantiate the contract between the parties in a court of justice: the Plaintiffs come here only to say, that, as against a wrong doer, they are entitled to the possession of the paper.

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SCOTT

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JONES.

CHAMBER J. That which may be the subject of an action, must be a thing of value; and to see whether it is of value, it must be looked at, and if it be as described in the declaration as a memorandum of an agreement, or instrument in writing, having no stamp, it cannot be looked at; and therefore, if it has no stamp, it must be of no value: this is a piece of paper of no value at all: the Plaintiffs cannot maintain an action for a paper of no value. There was a case wherein certain reissuable bills of country bankers, which may be reissued for a certain number of times, were, after being paid by their banker in *London*, stolen on their passage back to the country banker; and inasmuch as the stamps were not yet used up, and therefore were of some value, it was held that the notes might be the subject of felony; but it was taken for granted, that if there had been no stamp on them, they would have been of no value. The cases of *Hawkeswood*, and the like, go on a very different ground from

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JONES.

from this : here the paper is unavailable by the default of the party.

GIBBS J. It was not necessary here to give any notice to produce this paper: the Plaintiffs might, without shewing it, have recovered for it in trover, upon the description given of it in evidence. It used to be the practice in actions of trover for bills of exchange, to give notice to produce the bill : it has very lately been held in the Court of King's Bench, that such notice is unnecessary. My difficulty is, how to say this paper is not of some value : how that, which by paying 10*l.* can be made worth 50*l.* is to be said to be of no value. He referred to *Hawkswood's case*.

The Court granted a rule nisi.

On this day *Vaughan Serjt.* shewed cause against the rule, and *Best* supported it.

Per Curiam. This instrument is a thing capable of having a value given to it by being stamped. The meaning of the act is, that it shall not without a stamp be available as between the parties, so as to enable them to enforce the agreement.

Rule absolute. (a)

(a) Confer *Rex v. Gillson*, ante, I. 101.

17813.

BRINE v. FEATHERSTONE.

May 25.

THIS was an action upon a policy of insurance dated 3d July 1811 upon the ship *Mary Ann*, and her freight and cargo, at and from *Messina* to her port or ports of discharge in the channel, not to the Eastward of *Portsmouth*, with liberty to touch at *Malta* and *Gibraltar*, at a premium of ten guineas per Cent. Upon the trial of this cause at *Guildhall*, at the sittings after *Trinity* term 1812, before *Gibbs J.*, one part of the defence attempted to be established, was, that *Evitt*, the broker employed to effect the policy for the Defendants, had, on the 28th of *June*, when *Marshall*, who underwrote for the Defendant, and who was not the first underwriter, put his name on the slip, represented to him that the *Mary Ann* was then either near *Messina*, or at *Messina*, or on her homeward voyage. *Macallum*, an underwriter, who had signed the slip after *Marshall*, had, before subscribing the policy learned that the *Mary Ann* had then sailed only two days from *Palmouth*, and had communicated this fact to *Evitt* before *Marshall* had executed the policy, and had thereupon withdrawn his own name, and refused to subscribe the policy; *Evitt* did not however communicate this fact to *Marshall*, but suffered him to subscribe the policy. The Defendants also called other subscribers to the policy, neither of whom was the first underwriter, to prove what representations had been made to them. *Evitt* had on the 8th of *June* effected a policy on the ship's outward voyage; which *Marshall* himself underwrote for the Defendant. The *Gravesend* printed list, which was kept for public inspection at *Lloyd's*, shewed that the *Mary*

If an insurance broker states, by way of inference and computation, that a ship is at a certain place at the time of effecting a policy, it is not a ground of avoiding the policy, though the broker was utterly mistaken, the underwriter not taking the pains to inquire what were the facts on which the broker formed his conclusion.

No evidence can be received of representations made by the insurance-broker to other underwriters than the Defendant, subsequent to the first underwriter.

And evidence of representations to the first underwriter is received more on precedent than on reason.

Anu

1813. *Ann* failed on the 15th of *June* from *London*: she failed from *Falmouth* on the 30th of *June*, she did not go direct to *Messina*, but to *Malta* for a cargo: she stopped at *Gibraltar* for a considerable time, and while she lay at *Malta*, being unable to obtain freight, she was coppered with copper which she had carried out with her. She afterwards obtained a lading there, and carried it to *Messina*, and there took in a cargo for the homeward voyage, on which she failed on 1st *November*, and in the course thereof was captured. The Plaintiffs on the 8th of *November*, effecting a further policy, paid 14 guineas *per Cent* premium. The testimony of *Buitt* not agreeing with that of the Plaintiff's witnesses as to the representations he had made, it was put to the jury, that the witnesses, either on the one side or the other, must be perjured: *Gibbs J.* thought that there had been no misrepresentation of any fact, nor any fraud; and to avoid the policy there must be fraud; that the testimony of both sets of witnesses was reconcilable, upon the supposition that the broker had only stated his opinion and the inference respecting the state of the vessel, which he drew from circumstances: and that a mistake in that opinion would not, unless it were given with a fraudulent intent, avoid the policy. If the underwriters had intended to rely on his opinion and computation, they should have enquired the grounds of it, and then they might have chosen whether they would adopt it or not. A representation of a fact made by the broker, if false, would avoid the policy. The suppression of a material fact was a fraud: but there was a wide distinction between stating a fact and an opinion. What the broker stated was only an inference which he drew from facts; if the underwriter did not enquire what the facts were on which the broker founded his conclusion, the fallacy of the conclusion did not avoid the policy. If there were any facts existing,

existing, by which it was rendered impossible to draw such a conclusion as the broker expressed, it would be a badge that the conclusion was fraudulent; but in this case there was no evidence of his being acquainted with any such thing. The broker here stated merely his opinion that the ship was arriving or had arrived. If here he had stated his computation as fact, as in *Mæderwall v. Frazer*, 1 Doug. 260. he would be bound by it: he could not here mean to state it as a fact, for he states she was in one of three situations. Although his opinion was false, yet if it were not misrepresented by fraud, it would not avoid the policy. * He was strongly disposed to think that an underwriter should not lightly attribute fraud to a broker. The learned Judge received the evidence of representations made to underwriters subsequent to the first, with hesitation on the question of its admissibility. The jury found a verdict for the Plaintiff.

Vaughan Serjt. in *Michaelmas* term 1812 obtained a rule nisi to set aside this verdict and enter a verdict for the Defendants, upon the ground that *Evitt*, having, before the Defendant subscribed the policy, known his former representation to be false, therefore ought to have corrected it, and not suffered the Defendant to complete the contract.

On this occasion, with respect to the evidence of representations to others, *Heath* J. said, that the evidence of representations made to the first underwriter had been admitted; but that that was rather on precedent than on reason (a). *Mansfield* C. J. said it never had been extended to any underwriters subsequent to the first. The reason why it was admitted as to the first, was, that the others were apt to pin their faith

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(a) And see *Forrester v. Pigou*, 1 Maule & Selw. 9.

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upon the judgment of the first, which reason did not extend to representations made to later subscribers. *Gibbs J.* I think, subject to the opinion of the Court, this evidence was not admissible; I have looked into all the cases, and none of them carry it further than a representation to the first underwriter; and neither of these was the first.

Shepherd and Lens Serjts. in this term shewed cause. The parties might have ascertained by the *Gravesend* list the true time of the ship's sailing, and therefore ought not to have relied on loose conversation and conjecture, which materially differs from the positive assertion of a specific fact, such as was the case in *Macdowall v. Frazer*. The underwriter might have enquired the ground of the broker's opinion, and then he would not have been misled: this was no misrepresentation, nor a wilful concealment, there was no evidence in the cause where the Plaintiff lived, or that he knew the circumstances of the ship's sailing.

Best Serjt. and Vaughan, in support of the rule, contended for that which is laid down by Lord *Ellenborough C. J.* in *Hulle v. Cooper*, 14 *East*, 480., viz. that when a broker proposes a policy to an underwriter on a ship at and from a certain place, it imports either that the ship is there at the time, or shortly will be there; for if she is only to be there at a distant period, that might materially increase the risk. In this case it was within the knowledge of the broker, or at least of his principal, that the ship was not, nor could be, at or near *Messina*, when the policy was effected, and therefore that fact ought to have been expressly communicated by the principal to his broker, and by the broker to the underwriters, for the policy was effected on the 3d of July in

in consequence of instructions written from *Falmouth* on her sailing thence on the 30th of *June*. It is material that this communication should be made, on account of the difference in premium between summer and winter risks, and the concealment that the risk intended to be insured was a winter risk, (and this ship did not sail from *Messina* till *November*), avoids the policy.

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v.

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MANSFIELD C. J. I have often wondered at the extreme negligence of underwriters. In this case no one takes the trouble to look at *Lloyd's* list, to see when the ship sails, or where she is: here is a conversation, and the broker denies that he ever made any such representation as is imputed. This is not at all like the case cited from *Douglas*. This is merely a representation of a very wild and strange conjecture of the broker: he was very careless. It always struck me very strongly; that if a ship was insured at and from *Jamaica* to *London*, it must be inferred she was then at *Jamaica*; but I have seen so many insurances on homeward voyages subscribed without the least knowledge in the underwriter where the ship was, that I am persuaded that no special juryman would pay the least attention to that matter.

HEATH J. I am of the same opinion. It would be extremely mischievous in the multiplicity of business which an insurance broker has to transact, if he were bound to remember and disclose the circumstances of every former relevant transaction in which he has been engaged. There is a case in 2 *Eq. Cu. Abr.* 682. D. *margin, b.*, where Mr. *Pigott*, the conveyancer, had a title laid before him, with notice of a certain incumbrance, and presently another abitract was laid before him without notice of it, and an attempt was made to

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apply to the second principal the notice made to the conveyancer. No, says the Court, he cannot be expected to carry in his head all the incumbrances on all the abstracts he reads. The same thing applies to the multiplicity of policies which these persons effect.

CHAMBER J. concurred:

GIBBS J. I was glad at the trial to avoid imputation on either of these conflicting witnesses, and therefore it must be taken that *Marshall's* evidence went to the jury as true, and that was a fair ground for the Defendant to move on; but the way I put it to the jury was this, that suppose *Evetts* said what *Marshall* swore, it was only a statement by him of a conclusion which he drew, and if there were reason to doubt the truth of that conclusion, the underwriter should have enquired into the facts that raised the ground of that expectation. This is not like the case of *McDowall v. Fraser*, for there the broker represented as a fact that the ship was seen in the *Delaware*, on the 11th of *December*, and therefore the underwriter would naturally suppose that the broker was informed of that as a fact, not as an inference which he formed. This is more like the case of *Barber v. Fletcher*, *Doug.* 306., where the broker, speaking of the ship insured, with several others, said, "which vessels are expected to leave the coast of *Africa* in *November* or *December* 1777," and in truth the vessel in question had sailed in *May* 1777, and Lord *Manfield C.J.* held that the representation was not material: it was only an expectation, and the underwriters did not enquire into the ground of the expectation.

Rule discharged.

1813.

HALLIDAY and Another v. FITZPATRICK.

May 16.

IN this action brought by *John Halliday*, bail were put in and appeared to justify at the suit of *John Halliday*; but the officer entered their recognizance as bail at the suit of *Charles Halliday*. The Defendant having surrendered, the bail had obtained a rule *nisi* to amend the *committitur* and the bail-piece, by altering the name of *Charles* to *John*, and to stay proceedings against the bail.

If the bail acknowledge in a cause in which the Plaintiff is correctly named, and the officer by a misprision incorrectly names the Plaintiff in the recognizance of bail, the recognizance may be amended at the instance of the bail, by substituting the Plaintiff's right name.

Best Serjt. shewed cause against this rule, contending that no alteration could be made in the bail-piece, because it would be making a new contract for the parties into which they had never entered, and would at least put the Plaintiff to a new action against the bail, or rather would defeat the plaintiff's present action, and he could have no new action in lieu thereof; nor could the bail after the amendment be indicted for perjury, not having sworn to their sufficiency in the action which would then appear on the record.

Per Curiam. The bail could not aver against the record, therefore it would bind them after the amendment. The record is not the contract, but is only the record of the contract, and if there be a clerical misprision, it may be amended. It is the bail who make this application, and swear they entered into the contract with reference to the one name, and the Court, without their privity, have inserted another name in the record.

Rule absolute.

Shepherd Serjt. contra.

1813.

(IN THE EXCHEQUER-CHAMBER.)

May 22.

ANONYMOUS.

Interest given
on affirmance of
a judgment on a
promise to give a
mortgage.

GASSELL moved for interest upon the affirmance of a judgment in error. The action was *assumpsit*, and was founded upon an instrument whereby the Plaintiff in error acknowledged that he owed the Defendant in error a certain sum, for which he had given him a promissory note payable at a day named, and had also deposited the title-deeds of an estate therein mentioned, and engaged to execute a mortgage thereof. He said, that in *Michaelmas* term 1812 interest had been allowed on a letter promising to give a bond.

Rule absolute.

May 27.

GYE v. FELTON.

No action can be maintained for harbouring an apprentice as such, if the master to whom he was bound was then not an house-keeper, and of the age of 24 years.

THE Plaintiff declared, that by an indenture of apprenticeship of 7th *November* 1809, *Thomas Shepherd*, an infant under the age of 21 years, by and with the consent and approbation of *Mary Gye*, his next friend, testified by her executing that indenture, put himself apprentice to the Plaintiff, by the name and addition of

Whether in an action by a master for harbouring his apprentice it is necessary for him to prove that he has made oath that the premium mentioned in the indentures is the whole premium he has received, *quære*.

Whether a master who exercises a trade not within the statute 5 *Eliz. c. 4.* can legally take an apprentice, *quære*.

The stamp-duty on indentures of apprenticeship, where the premium exceeds 50*l.*, and is less than 100*l.*, is 5*s.* by 48 *G. 3. c. 149.*

If it be doubtful whether a statute declaring an act, instrument, or contract void, makes it voidable only, another clause in the same statute imposing a penalty on such act, instrument, or contract, is a clear test that it is *ipso facto* void.

H. Gye

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H. Gye of the city of *Bath*, printer, to learn his art, and with him, after the manner of an apprentice, to serve from the day of the date thereof for the term of seven years then next; by virtue of which indenture, *T. Shepherd* entered and was received into the service of the Plaintiff, as such apprentice, and continued in such service until the 20th July 1811, when he, still being the Plaintiff's apprentice under the said indenture, unlawfully, without the Plaintiff's licence or consent, and against his will, departed from his service, and came to the Defendant; and that the Defendant, well knowing *Shepherd* to be the Plaintiff's apprentice under that indenture, but contriving to injure the Plaintiff, and deprive him of the service of *Shepherd*, and of the profits thereof, wilfully, wrongfully, and without the Plaintiff's licence, and against his will, received *Shepherd*, so then being the Plaintiff's apprentice, into the Defendant's service, and harboured, and kept him a long time, whereby the Plaintiff lost his service and the profits thereof. The cause was tried at *Guildhall*, at the sittings after *Trinity* term 1812, before *Mansfield* C. J., when a verdict was found for the Plaintiff, which

Shepherd Serjt., in *Michaelmas* term 1812, obtained a rule nisi to set aside, and to enter a nonsuit, upon four objections which had been reserved to him at the trial, viz. 1. That it was proved that the Plaintiff, to whom *Shepherd* was apprenticed, was not a housekeeper, as required by the statute 5 *Eliz.* c. 4. s. 26., but lived and wrought with his mother; who kept house, and to whom the trade belonged. 2. That the Plaintiff, who was a printer, carried on no trade mentioned in the statute 5 *Eliz.* c. 4. and therefore was not capable of having an apprentice. 3. That the Plaintiff was not 24 years old, as required by s. 26. of that act, when the indenture of apprenticeship averred in the declaration,

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and proved, was executed. 4. That the indentures were received in evidence without proof being given that the party on whose behalf the same were given in evidence had first made oath that to the best of his knowledge the sum therein for that purpose inserted or mentioned was really and truly all that was, directly or indirectly, given, paid, or secured, or contracted for, on behalf or in respect of such apprentice, to or for the benefit of the master with whom such apprentice was put or placed, as was required by the statute of 8 Ann. c. 9. s. 43.

By Serjt. in this term sh^dew'd cause against the rule. The objection to the validity of the indentures for want of compliance with the requisites of the statute of *Elizabeth* can only be taken by the parties themselves, as hath been determined in the cases of *Rex v. St. Nicholas, Ipswich*, 1 *Bott*, 525. S. C. *Burr*, S. C. 171. *Winchcomb v. Winchesser*, *Hob.* 166. *Barber v. Dennis*, 1 *Salk.* 68., and *Rex v. Evered*, 1 *Bott*, 530. S. C. *Salk.* 26. *acc.* With respect to the oath required by the statute of *Anne*, if it be usually made, it is deposited at the stamp-office; it never yet was produced or required on the trial of similar actions. The statute does not require the oath to be reduced to writing, nor designate when and how it is to be taken, but it is to be presumed that the officers of the stamps take due care that the stamp shall not be affixed to the indentures, unless the oath is made; and it would cast a grievous burthen on apprentices, if they could not obtain admission to any corporation, without proof that the sum inserted in their indentures had been sworn to, not by the apprentice himself, but by some other. According to the doctrine of *Aston J.* in *Rex v. Evered*, the act of an apprentice in running away is not a dissent from and avoiding of the indentures by the party.

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 v.
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Shepherd and *Vaughan* Serjts. in support of the rule. The stamp on the bond was a 50*s.* stamp; the premium was 99*l.* 19*s.* The statute of *Anne*, which is not repealed by the statute 48 G. 3. c. 149., imposes a duty of 1*s.* in the pound, when the apprentice fee exceeds 50*l.*; therefore the stamp does not denote the payment of the full consideration money. [*Per Curiam.* The statute 48 G. 3. c. 149. *Schedule. Part 1.* repealing the duty imposed by the statute of *Anne*, imposes 50*s.* duty on indentures of apprenticeship where the sum paid exceeds 50*s.*, and does not amount to 100*l.*; and it was in evidence in this case that 99*l.* 19*s.* only was paid.] That act does not however repeal the other regulations of the act of *Anne*, and therefore it is still incumbent on the master, who sues in this case, to prove that he has taken the oath directed, and complied with all other requisites thereof. *Rex v. Gainborough, Barr. S.C.* 586. *S.C.* 1 *Bott*, 546. As to the other point, there is great difficulty in holding that an instrument shall be only voidable, when the statute 5 *Eliz.* c. 4. s. 41. expressly says, that “all indentures, covenants, promises, and bargains, of or for the having, taking, or keeping of any apprentice, otherwise thereafter to be made or taken than is by that statute limited, ordained, and appointed, shall be clearly void in law to all intents and purposes whatsoever.” In the case of *Smith v. Birch*, 1 *Sess. Cas.* 222. *S.C.* 1 *Bott*, 523., before the statute 31 G. 2. c. 11. had repealed the statute of *Elizabeth* in this respect, it was holden that an action could not be maintained for seducing an apprentice, who was bound by a deed styling itself an indenture, but not indented. *The opinion of *Aston J.* that an apprentice absconding did not thereby shew his dissent to the indentures, is a strange decision. In the present case the apprentice had first spontaneously left the master, before he went to the defendant, and being required to return, he deliberately refused; this

CASES IN EASTER TERM

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v.

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was as positive a dissent, as he could express; and after that dissent, it was not illegal for the defendant to entertain him.

Cur. adv. vult.

On this day *Mansfield C. J.* delivered the opinion of the Court.

MANSFIELD C. J. Upon looking into the statute 5 *Eliz. c. 4.* which is a very great and comprehensive law, and probably was at the time a very wise one, to prevent there being any idle persons in the kingdom, it appears that servants are obliged to be hired, and apprentices to be bound, no person is to remain idle in the whole kingdom; but with respect to the words of the 41st section, on which the present question arises, certainly they at first startle one: it says, "all indentures made otherwise than is by that statute appointed, shall be clearly void to all intents and purposes." Yet there have been many cases cited, which say, that indentures which do not conform to the act shall be only voidable, and not void. If the word voidable were applied to adults, it would be extremely strange: with respect to infants, if applied to them, one can understand it. In all those cases the question arose with respect to the rights of infant apprentices; but there has been no case cited, where the doctrine that the contract is voidable, not void, is applied to the case of a master, and it would be very wonderful if there were. But there is a ground, I think, which makes it impossible for the Plaintiff to recover in this case, he not having complied with the provisions of this act, and, contrary to the express provisions of the 26th section, he being neither a householder, nor above the age of 24; for besides the words making it void to all intents and purposes, it is in the same section further provided, "that every person that shall from thenceforth take or newly retain an appren-

" tice, contrary to the tenor and true meaning of that
 " act, shall forfeit and lose for every apprentice so by
 " him taken, the sum of 10/." So, making it not only
 void, but unlawful; and if such a taking is illegal, and con-
 trary to this law, it is impossible that the master can
 recover damages for the violation of a supposed right,
 originating only in a contract which the law for-
 bids: without going any further, therefore, it suffices
 that on this ground the rule for a nonsuit must be
 made

1813.
 GYE
 v.
 FELTON.

Absolute.

GRUGGEN, Plaintiff; WHITE, Deforciant.

May 31.

ON SLOW Serjt. had, at the instance of the cyro-
 grapher, on a former day obtained a rule *nisi* for an
 attachment against the attorney, who sued out the writ
 of covenant in this fine, for not bringing into the cyro-
 grapher's office the fine levied in this cause, as well as
 all other fines wherein he was the solicitor, pursuant to
 the rule of Court made in *Trinity* term 1812, and that
 he should pay to the secondaries of the cyrographer's
 office the costs of this application; he moved this
 upon an affidavit made by one of the secondaries, that
 a fine between these parties appeared to be duly le-
 vied of *Trinity* term 1812, that this, and many other
 fines of lands in *Sussex* and other counties, which ap-
 peared to have been sued out by the solicitor in que-
 tion, and to have passed the king's silver office, had not
 been brought into the cyrographer's office; and that
 repeated applications which had been made by the
 secondaries

An attorney
 having omitted to
 perfect certain
 fines, in obedience
 to the rule of
 Court of *Trinity*
 term 52 G. 3., the
 Court granted an
 attachment against
 him, with costs of
 the application
 made at the in-
 stance of the
 cyrographer.

1813.

GRUGGEN

v.

WHITE.

secondaries to this gentleman, to induce him to perfect these fines, the completion of which would be productive not only of fees to the secondaries, but of stamp duties to the crown, had failed of success.

Shepherd Serjt. on a former day shewed cause against this rule, upon an affidavit of the attorney that he had mislaid some of the papers and deeds; and endeavoured to extenuate his offence, which the Court was disposed to consider as very flagrant; the Court however indulged him with time until the sitting of the Court on this day, to bring in and complete all the fines and pay the fees, upon his now producing an affidavit that these fines were all which he was retained to solicit, but they were of opinion that he had not much improved his case by an affidavit he produced, stating that he had thrown about his clients' title deeds in confusion, and could not find them. If all was not completed by the time specified, the Court felt itself bound, in duty to the suitors, to make the attachment absolute: if he had rendered it for any reason impossible, he must bear the consequences of his former neglect, which had rendered it impossible.

Upon this day it appeared that this gentleman had brought into the cyrographer's office no less than forty-seven fines, but he had not chosen or had not ventured to make an affidavit that these were the only fines that were then unfinished in his office, whereupon the Court, after again strongly reprobating the negligence by which a practitioner suffered the titles of so many of his clients to be thus exposed to the danger of being lost, and commending the officer, who had done what was exceedingly right and honorable, in bringing the matter before the Court, as was

his duty, made the rule absolute in the terms in which it was prayed. (a)

(a) See *Segmour v. Barker*, ante, 2. 178., where the Court refused costs to the cyrographer; so that there seems to be a distinction in this respect between the case where the officer applies merely for the sake of regulating the practice, and where he applies for the purpose of punishing disobedience to a rule of Court.

1813.
GRUGGEN
v.
WHITE.

Doe, on Demise of HARCOURT, v. ROE.

May 31.

Same, on Demise of Same, v. ROE.

THE lessor of certain premises having brought an ejectment for nonpayment of rent, and obtained judgment against the casual ejector, and executed a writ of possession, *Runnington Serjt.*, on behalf of the assignees of the lessee, who had become a bankrupt, had moved to set aside the judgment and restore the possession, upon payment of the rent arrear, and the costs of the action; but the assignees finding that the amount of the rent arrear, which had not been stated to them before the motion made, was greater than the value of the lease, they neglected to draw up the rule. Certain other premises had been demised to the same lessee, and had come by assignment to one of the persons who were the assignees of the bankrupt. Another ejectment was pending between the same parties for recovery of those premises, and the like judgment had been passed, and the like rule had been obtained to set it aside.

If a party obtaining a rule does not choose to proceed on it, the other party cannot compel him.

Upon a motion to set aside an ejectment and restore the possession upon payment of the rent due, and costs, the rent must be calculated only to the last rent-day, not to the day of computing.

Byl Serjt., who appeared on behalf of the lessor, for the purpose of shewing cause against both these rules, insisted, that in the first of these causes, the assignees, by applying to the Court, had positively engaged to draw up the rules to pay the rent arrear, and resume the possession

1813.

DOE
v.
ROE.

session of the premises, (which, pending the action, had become dilapidated,) and prayed that the Court would compel them so to do, or punish them for the omission, as for a contempt of the Court.

The Court was unanimous that the tenants only came to pray an indulgence, and that the Court, in granting it, only conferred on them a right which they might abandon, if they found it not worth pursuing; if they did not choose to avail themselves of the indulgence, the Court could not compel them so to do, and the Plaintiff could only discharge the rule with costs, which was done.

In the other cause the prothonotary reported that he had computed the rent for the fractional time which had elapsed between the last day whereon the rent was made payable by the lease, and the time of the appointment before the prothonotary, and that such was the usual practice in like cases. The Court clearly held that this practice was wrong, inasmuch as no rent could become due but on the days of reservation, and directed the fractional part to be deducted; which being done, the rule in that cause was made

Absolute.

May 31.

IRELAND, Clerk, v. CHAMPNEYS.

The Plaintiff, in an action for libel, died after interlocutory judgment signed

and writ of inquiry executed, but before the next day in bank: Held that final judgment could not be entered for the Plaintiff, for the damages assessed, the suit having abated by his death.

THIS was an action upon the case for a libel. The Defendant first pleaded the general issue, but was afterwards permitted to withdraw that plea, and to

suffer

suffer judgment by default, upon the terms of bringing no writ of error, and of executing a writ of enquiry before a judge of assize, which was accordingly executed before Wood B. at the Taunton spring assizes 1813, when the jury gave fifteen hundred pounds damages. After that assessment, and before the next day in bank, the Plaintiff died, his executors nevertheless entered up final judgment for the damages assessed and costs. *Lees* Serjt. had on a former day obtained a rule *nisi* to set aside this judgment for irregularity, upon the ground that the suit had abated by the Plaintiff's death, and that no statute had provided a remedy for this accident.

1813.
 IRELAND
 v.
 CHAMPNEYS.

Shepherd and *Pell* Serjts. endeavoured to shew cause, contending that this was a case provided for by the statute 17 Car. 2. c. 8. s. 1., for that the Plaintiff had died between verdict and judgment: it had never been decided that this was not a case within that statute.

But the Court was clearly of opinion that the suit had abated by the Plaintiff's death: no one had ever before thought of signing final judgment under similar circumstances.

Rule absolute.

ANONYMOUS.

May 31.

THE Plaintiff having signed an interlocutory judgment by the neglect of the Defendant, *Shepherd* Serjt. had obtained a rule *nisi* to set it aside, upon an affidavit of merits: it appeared that the action was brought against the Defendant, who was an executor, for a simple contract debt of the testator, and that there

A Defendant against whom a judgment had been signed, and who had a good legal defence, having refused equitable terms of compromise, the Court

denied him the indulgence of setting aside the judgment and permitting him to plead.
 were

1813.

ANONYMOUS.

were specialty debts of the testator outstanding to the amount of all the personal assets which had come to the Defendant's hand. *Clayton* Serjt. shewed cause, upon an affidavit which stated that the Defendant was not only executor, but also heir to the testator, that land of the value of 200*l.* a-year had descended to him, which was liable for the specialty debts, that the Plaintiff had offered to refer all matters, and to empower the arbitrator to marshal the assets in a course of equitable distribution, and was willing to wait for payment of his own debt until the land should be sold, and the purchase-money received; which offer the Defendant had refused: and upon this ground *Clayton* contended, that as it was discretionary in the Court to set aside the judgment, and as the Defendant had refused so liberal an offer, he was not entitled to the indulgence of being let in to plead that there were specialty debts unsatisfied.

Shepherd endeavoured to support his rule, upon the ground of the hardship which would ensue to the Defendant, who would be guilty of a *devastavit*, and liable *de bonis propriis*, if he should be by this judgment compelled to apply the personal assets in payment of debts of inferior degree.

But the Court thought that, as the Defendant had refused the very fair terms which had been offered him, they ought not to interpose in his favour, and

Discharged the rule.

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DOE, on Demise of TUBB, v. ROE.

May 31.

THE Plaintiff, who was mortgagee of the premises, had obtained possession under an ejectment which had been served on the occupier of the premises, a tenant of the mortgagor, and which was not defended. The mortgagor had obtained a judge's order for referring it to the prothonotary to enquire what was due for principal and interest on the mortgage, and that on payment thereof, the mortgagee might be restored to his possession, and he afterwards made that order a rule of Court. *Shepherd* Serjt., for the mortgagee, had, on a former day, obtained a rule *nisi* for setting aside that rule and order, upon the ground that the present case was not provided for by the statute 7 G. 2. c. 20., which extended only to cases where the mortgagee recovered in ejectment adversely to the mortgagor.

Marshall Serjt., on a subsequent day, shewed cause against this rule; and

Shepherd supported it, upon two grounds: first, that there was a suit in equity still pending, which, though stayed by compromise, was not dismissed. Secondly, that the ejectment was now absolutely at an end; whereas the statute requires the payment to be made, or money brought into Court, pending the action; and also that it be after the Defendant's appearance, who, in this case, had never appeared.

Per Curiam. The statute requires an appearance before the party can take the benefit of the statute; until appearance the Court has no jurisdiction.

If a mortgagee recovers possession of the mortgaged premises under a judgment in an undefended ejectment, the Court has no jurisdiction to restore, on payment of the debt, interest, and costs, the possession to the mortgagor, who has not appeared.

But if the recovery is had against a tenant of the mortgagor, the Court will set aside the judgment, and let in the mortgagor to defend as landlord, that he may be in a condition to apply to the Court to stay proceedings on the terms of the statute.

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The lessor of the Plaintiff not acceding to the recommendation of the Court to go before the prothonotary, and ascertain and receive what was due for principal, interest, and costs, the Court made the rule absolute to discharge the rule for referring the debt to the prothonotary, and for staying proceedings on payment of the sum due.

The Court, however, on a subsequent day, granted *Marshall* a rule nisi to set aside the judgment and execution in ejectment, on payment of costs, and that the mortgagor might defend as landlord; and after hearing *Shepherd* in opposition, and *Marshall* in support of the rule, they were prepared to make it absolute, and to grant thereupon, after appearance, the rule before prayed for; whereupon *Shepherd* consented to go before the prothonotary to state the account, and upon payment of what should be found due, to restore the possession, and deliver up the mortgage deeds.

May 31.

UGHTERLONY and Others, Assignees of
GAIRDNER'S, Bankrupts, v. EASTERBY and
Others.

To enable the holder of a bankrupt's acceptances to avail himself of them in an action by the assignees against himself on his own acceptance, by way either of set-off,

THE Plaintiffs declared on a bill dated the 2d of June 1810, drawn by the defendants at *Newcastle-upon-Tyne* upon Messrs. *Puller*, London, at 70 days' date, for 336*l.* 7*s.* 10*d.*, payable to the Defendants' order, and accepted by the drawees, payable at the Bank of England, indorsed and delivered by the Defendants to

or of mutual credit, he must most distinctly prove, either that the obligation on himself to pay the bill so set off subsisted before the bankruptcy, or that there was a mutual credit created in the origin of the bills.

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T. Atkinson and Co., and by them to the bankrupts; and the Plaintiffs averred presentment at maturity for payment at the bank, but that neither the drawee nor any on their behalf then or afterwards paid the same, by reason whereof the Defendants became liable, and promised to pay. The Defendants gave notice of set-off for 406*l.* 7*s.* upon a bill of that amount dated 14th *May* 1810, drawn by *A. Gardner* and Co., (the style of the bankrupts' house at *Edinburgh*;) in their own favor at four months after date, and accepted by the bankrupts, and indorsed by the drawers to the Defendants; and upon another bill for 209*l.* 10*s.* 8*d.* dated 29th *July* 1810, drawn by *A. Gardner* and Co. upon, and accepted by the bankrupts, payable three months after date to the drawers order, and by them indorsed to the Defendants, and also for interest, money lent, money had and received, money paid, and on an account stated; and by a further particular, they explained the latter sums to consist of the monies and effects which the Defendants had delivered to the holders of these two bills for the purpose of taking them up, with interest and costs in consequence of the bills being dishonored by the bankrupts, *viz.* for taking up the first mentioned bill for 406*l.* 7*s.* out of the hands of Messrs. *Harding, Hill,* and Co. the then holders, and the bill for 209*l.* 10*s.* 8*d.* out of the hands of Messrs. *C. and R. Puller* the then holders, and also in respect of a bill of 12th *June* 1810, for 406*l.* 12*s.* drawn by the Defendants on and accepted by *C. and R. Puller* at three months after date, payable to the Defendants' order, and by them indorsed and delivered to *Atkinson* and Co., and by them to the bankrupts, and by them to the *British* linen company, in whose hands the Defendants paid the same, with interest and costs thereon, which last-mentioned bill was given by the Defendants, or by *Atkinson* and Co. for them, in exchange for the above first mentioned bill of 406*l.* 7*s.*;

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and also in respect of another bill for 300*l.* dated 24th July 1810, drawn by the Defendants upon and accepted by C. and R. Puller, payable three months after date to the Defendants order, and by them indorsed and delivered to Atkinson and Co., and by Atkinson and Co. to the bankrupts, and by them to Powell, in whose hands the Defendants paid the same with interest, and the costs of three actions at law at the suit of Powell, thereon, against C. and R. Puller, Atkinson and Co. and the Defendants, which bill for 300*l.* was given by the Defendants, or by Atkinson and Co. for them, in exchange for the before-mentioned bill of 299*l.* 10*s.* 8*d.* Upon the trial of the cause, at a sitting in London in this term, before Mansfield C. J., it was proved that the Defendants and the Plaintiffs had been in the practice of assisting each other by mutual acceptances; that the Defendants had accepted the bill upon which this action was brought, for the accommodation of the bankrupts, who had at the same time accepted a bill of the like amount for the accommodation of the Defendants, each party engaging to provide for the payment of their own respective acceptances. When the bills became due, the Defendants failing to pay their acceptance, the bankrupts paid both, so that nothing was due from the bankrupts to the Defendants on this transaction, as one of the Defendants had on his examination before the commissioners of Gairdner's bankruptcy admitted. The Defendants however offered in evidence under the set-off the bills upon which they had given notice of set-off, accepted by the bankrupts, and overdue, and unpaid by the acceptors; but they did not prove upon what consideration the bankrupts accepted them, nor at what time, or upon what consideration those bills had come to the Defendants' hands, nor that the Defendants' names were on them, nor that there was any original connection between the Defendants and these bills; and it was clear

clear that the bills were, in their original concoction, in no wise connected with the bill on which the action was brought, and that the bills were not in the Defendants' hands at the time of the bankruptcy of *Gairdners*. *Lens* Serjt. for the Defendants, abandoned his claim of set-off, but contended that these bills constituted a mutual credit under stat. 5 G. 2. c. 30. s. 28., of which he might take advantage on the plea of the general issue, and that the Defendants might set up these bills in answer to the action, although they had lost them out of their hands, and were only answerable eventually in case of the default of the acceptor: that the bills carried about them an obligation of the Defendants, which they might at any time be called on to perform, if those whose duty it *prima facie* was to discharge the bills, should fail in that duty. The jury, however, under the direction of *Mansfield* C. J. found a verdict for the Plaintiffs for 380*l.* 9*s.* 10*d.*, being the amount of principal and interest.

Lens Serjt. on this day moved for a rule *nisi* to set aside the verdict and have a new trial. The fact of the bills not being in the Defendants' hands at the time of the bankruptcy, he said, did not prevent it from being a mutual credit. The case of *Smith v. Hodson*, 4 T. R. 211. was a much stronger case than this: there was no contingency in this case; for even if the holders had come in under the commission, they must nevertheless have resorted to the Defendants for all the deficiency beyond the dividend. Here, too, the bill was overdue, which was not the case in *Smith v. Hodson*. *Dickson v. Evans*, 6 Term Rep. 57. is materially different from this case. So, *Ex parte Hale*, 3 Ves. 306. is inapplicable. It was not pretended at the trial, that the Defendants had bought up these bills since the bankruptcy, as bills to which they were before strangers.

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1813.

The Court granted a rule nisi.

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Best Serjt. shewed cause *instantly*. The bill which is the subject of this action was accepted by the Defendants for the bankrupts; a counter-acceptance indeed was given by the bankrupts to the Defendants; but the bankrupts were obliged themselves to pay that bill as well as their own acceptance; and the bills which were relied on as constituting the mutual credit, were not in any way connected with the bill which was the subject of the action. The Defendants do not even pretend on the face of the particular they delivered of their set-off, that they, the Defendants, were ever parties to these bills, nor do they venture now to produce the bills. In the case *Ex parte Hale* it was decided, that even upon a bill which had been indorsed before the acceptor became bankrupt, the indorser, by taking it up, acquired no right of set-off or mutual credit.

Leni, in support of his rule, admitted that if the Defendants had been strangers to these bills until after the bankruptcy, they must fall within the case of *Dixon v. Evans*; but contended it must be inferred that there was a mutual credit upon an habitual exchange of accommodation bills.

MANSFIELD C. J. Whatever other transactions there may have before been between these parties, the bill of the 2d June 1810 was balanced by another of the like amount, and that transaction was closed. This case does not seem to come within the principle of *Smith v. Hodson*. What indorsements had been on these bills, I know not; whatever had been on the last of them, were entirely obliterated. I think therefore, as I thought at the trial, that the Defendant is not entitled to set them off.

HEATH J. expressed himself 'to be of the same opinion.

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CHAMBRE J. concurred. This is not a mutual credit, and we ought to be particularly cautious how we admit these things to be mutual credits; for it may lead, if abused, to great mischief.

GIBBS J. I will not pretend to say whether if the facts were such as suggested by the Defendants, they might be entitled to hold it as a mutual credit, but I think that this is a case in which the strictest and most particular proof is required, either that the obligation commenced before the bankruptcy, to bring it within the ordinary law of set-off, or that there was some connection in the origin of the transaction, to bring it within the cases of mutual credit. I therefore think with the rest of the Court, that there must be no new trial.

Rule discharged.

END OF EASTER TERM.

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A

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1. AN action on the case for a de-

ceit cannot be maintained by the seller of his share in a trade, against the buyer, who has persuaded him to sell it at a certain price, by a representation that certain partners, whose names he will not disclose, are to be joint purchasers, and that they will give no more, although in truth they had authorized the Defendant to purchase it, doing the best he could, and although the Defendant charged them with a higher price than he gave. *Vernon v. Keyes*. Page 488

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3. In case, the Plaintiff's cause of action arises, so entirely as to retain the venue, in the county where the injury is sustained. *Williams v. Land.* Page 729
 4. Case for permissive waste in buildings does not lie against a tenant by lease, who has not covenanted to repair. *Herne v. Bembro.* 764
 5. If a representation be made before a sale, of the quality of the thing sold, with full opportunity for the purchaser to inspect and examine the truth of the representation, and a contract of sale be afterwards reduced into writing, in which that representation is not embodied, no action for a deceit lies against the vendor on the ground that the article sold is not answerable to that representation. 779
 6. Whether the vendor knew of the defects, *ib*
 7. Or not. *Pickering v. Dowson, ib.*
 8. It being usual in the sale by auction of drugs, if they are sea-damaged, to express it in the broker's catalogue, and drugs which are re-packed, or the packages of which are discoloured by sea-water, bearing an inferior price, although not damaged, the Defendants, who had purchased some sea-damaged pimento, repacked it, and advertised it in catalogues which did not notice that it was sea-damaged or re-packed, but referred it to be viewed, with little facility, however, of viewing it: they exhibited impartial samples of the quality, and sold it by auction. Held that this was equivalent to a sale of the goods, as and for goods that were not sea-damaged, and that an action lay for the fraud. Page 847
 9. And though the declaration stated also that it was sold as and for pimento of good quality and condition, whereas the samples shewed that it was dusty and of inferior quality, yet the jury having found for the Plaintiffs, the Court refused to set aside the verdict. *Jones v. Ewerden.* *ib.*
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3. In order to facilitate the making of an agreement, for which there was sufficient consideration between the Plaintiff and a third person, the Defendant, who received no benefit to himself by the agreement, became party thereto. Held, that as the agreement was such as the Plaintiff would not have made, unless the Defendant had acceded, there was a sufficient consideration for the Defendant's promise. *Bailey v. Croft.*

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3. The Court will, pending a writ of error, amend a clerical mistake in the declaration, upon which the Defendant relied for his matter of error. *Moody v. Stracey.* 588

4. If the bail acknowledge in a cause in which the Plaintiff is correctly named, and the officer by a misprision incorrectly names the Plaintiff in the recognizance of bail, the recognizance may be amended at the instance

stance of the bail, by substituting the Plaintiff's right name. *Hulliday and Another v. Fitzpatrick*. Page 875

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2. A concession to the grantor of an annuity of a greater facility of redemption, made at a time subsequent to the original grant of the annuity and enrolment of memorial, needs not to be memorialized. *Booth v. Druce*. 252
3. The grantor of an annuity was required, for further security, to make her will and deposit it with the grantee, and to make an affidavit that she would not revoke it: a magistrate refused to let her swear the affidavit, but the grantee retained the will. 10*l*, which had been retained till the grantee should make the affidavit, were then paid to the grantee. The memorial did not notice the will. Held that the memorial was therefore bad, but that the 10*l*. was not money retained within *f. 4.* of the stat. 17 G. 3. c. 26. *Ex parte Mackenzie*. 323
4. If the grantor of an annuity secures it by a bond, whereby he binds himself, his heirs, &c., it is not necessary that the memorial of the bond should describe it as binding his heirs. 346

5. *Seemle* that nothing more is necessary to make good the memorial of an annuity, than a compliance with the requisites which are prescribed in terms by the statute 17 G. 3. c. 26. *f. 1.* *Horwood v. Underhill*. Page 346
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7. It is sufficient in the memorial of an annuity to state that the securities were executed "in the presence of T. C. of, &c." without expressing that he subscribed his name as an attesting witness. *Wallis v. Lach*. 711
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2. Nor by a stranger joining. *ib.*
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ARMY,

And see MONEY HAD AND RECEIVED, 1.

10. An action of trespass lies for an inferior military officer against his superior officer (both being under martial law,) who imprisons him for disobedience to an order made under colour, but not within the scope of military authority. Page 67
2. Although the imprisonment be followed by a trial by a court-martial. *ib.*

3. The colonel of a regiment has no authority to order his serjeant to pay money towards lighting and warming a regimental school and school-master's salary. *ib.*
- . Nor, as it seems, to order them to attend school to learn to read and write. *Warden v. Bailey.* *ib.*
- . A soldier is gifted with all the rights of other citizens, and is bound to all the duties of other citizens, and he is as much bound to prevent a breach of the peace or a felony as any other citizen. If it is necessary for the purpose of the preventing mischief, or for the execution of the law, it is not only the right of soldiers, but it is their duty, to exert themselves in assisting the execution of a legal process, or to prevent any crime or mischief being committed. *Burdett v. Abbott*, 449, 450.

ARREST,

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A plea justifying an arrest by a private person, on suspicion of felony, must

must shew the circumstances, from which the Court may judge, whether the suspicion were reasonable

Page 3.

2. Action of false imprisonment: the Defendants pleaded that before the time when, &c. certain persons unknown had forged receipts on certain forged dividend warrants, and received the money purporting to be due in respect thereof in bank notes of the Bank of *England*, amongst which was a note for 100*l.*, which was afterwards exchanged there for other notes, and amongst them one for 10*l.*, the date and number of which was afterwards altered; that afterwards, and a little before the time when, &c. Plaintiff was *suspiciously* possessed of the altered note, and did, in a *suspicious manner*, dispose of the same to one *A. B.*, and after, and before the time when, &c. in a *suspicious manner* departed and left *England* and went to *Scotland*, and there continued; whereupon Defendants had reasonable cause to suspect, and did suspect, that Plaintiff had forged the said receipts, whereupon Defendants gently laid their hands on Plaintiff, and carried him to and detained in a gaol in *Scotland*, in order that he might be conveyed, by a warrant to be issued by a justice of the county of *Middlesex*, to be dealt with according to law: Held that this plea was too general on demurrer; for it is necessary to shew in pleading the causes of suspicion in certainty, in order that the Court may judge of their reasonableness; and the using the term sus-

picious will not aid what is necessary to be averred. Page 34

3. Whether a Defendant justifying an arrest in *Scotland*, as made on suspicion of a felony committed here, must shew that the law of *Scotland*, as well as the law of *England*, warranted such arrest, *Quare. ib.*
 4. Or, whether the Defendant shewing by his plea an arrest made in *Scotland*, which if made in *England* would be warranted, it does not lie on the Plaintiff suing in *England* to reply that by the law of *Scotland* the arrest was not warranted, *Quare. Acc. per Chambre J. ib.*
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See DEMURAGE, 1. PLEADER, V
5. AGREEMENT, 3; 4. BANKRUPT, II. 1.

A lessor contracted to pay his tenant at a valuation for certain erections pursuant to a plan to be agreed on, provided they were completed in two months: no plan was agreed on, and after the condition broken, the lessor encouraged the lessee to proceed with the work: Held that the lessee might recover on an implied promise arising out of so many of the facts as were applicable to the new agreement. *Burn v. Miller.* 745

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See ATTORNEY'S BILL. FINE.

PRACTICE OF LEVYING, 4. 7. 9. 15.

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1. If a Defendant's attorney, without sufficient ground, directs an application under the statute 43 G. 3. c. 46. that the Plaintiff, having holden Defendant to bail and recovered at trial less than he, shall pay the Defendant's costs; the Court, in discharging the rule, will direct the costs of the motion to be paid by the attorney. *Rolfe v. Rogers.* *Rogers v. Lungefs.* Page 191

2. The rights between party and party are paramount to the rights between the attorney of one of the parties and his client. *Brown v. Sayce.* 320

S. P. Figs v. Adams. 637

3. A Solicitor of the equity side of the Court of Exchequer is not entitled to practise in the Court of Chancery: nor, if he does, can he maintain an action for the amount of his bill.

4. And *semble*, that a solicitor of the Court of Chancery cannot by consent in writing authorize a solicitor of the Court of Exchequer to practise there in his name *Vincent v. Holt.* 452

5. The lien which an attorney has on the papers in his hands, is only commensurate with the right which the party delivering the papers to him has therein.

6. Every one, whether attorney or not, has, by the common law, a lien on the specific deed or paper delivered to him to do any work or business

business thereon, but not on other muniments of the same party, unless the person claiming the lien be an attorney or solicitor. *Hollis v. Cluridge.* Page 807

ATTORNEY'S BILL.

And see ATTORNEY, 3.

1. An attorney may deliver a bill of costs containing such abbreviations of *English* words as are usual and intelligible. *Reynolds v. Caswell.* 293
2. An attorney's bill may be referred for taxation, though it is his executor who sues on it. *Penson, Executor, v. Johnson.* 724
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1. An auctioneer is by implication an agent duly authorized to sign a contract for the purchase of a real estate on behalf of the highest bidder. 209
2. And his writing down the name of the highest bidder in the auctioneer's book is a sufficient signature to satisfy the statute of frauds. *ib.*
3. And if the highest bidder is agent for another, the auctioneer's signature of the bidder's name will bind the principal. *ib.*
4. At least if the principal is present, and consulting with the agent during the sale, and makes no objection before the entry made in the book. *White v. Fradlor.* *ib.*

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See CONTRIBUTION, 1, 2.

AVERMENT.—*What must be proved if averred.*

An averment of a judgment against *A. B.* is not proved by evidence of a judgment against *A. B.* and *C. D.* *Readshaw v. Wood.* Page 13

B

BAIL.

- I. *Of the Arrest and the Bail.*
- II. *Proceedings against the Bail or the Sheriff.*
- III. *Surrender of the Principal.*
- IV. *Discharge by other Means.*
- V. *Writ of Error.*
- I. And see PRACTICE, II. 1. 3. OUTLAWRY, 3, 4. AMENDMENT, 4.
It is a sufficient objection to bail, that he hath privilege of parliament, whereby the Plaintiff may be delayed in obtaining payment from him. *Graham v. Sturt.* 249
It is not sufficient for bail to swear they are worth a certain sum "exclusive of their debts." *Horne v. Carr.* 704
- II. And see PRACTICE, II. 3. INTEREST OF MONEY, 7. SHERIFF.
Although a bail having rendered the Defendant instigates him to vexatious attempts to obtain his discharge under an insolvent act, the Court will not compel him to pay the

the costs of the Plaintiff's resisting those attempts. *Winstanley v. Head.*

Page 192

2. The Plaintiff may proceed against the bail although the original action is out of court, it not appearing whether the bail-bond was assigned. *Collett v. Wilson.* 115

IV.

1. If a Plaintiff accepts from the principal Defendant a *cognov* which he gives him time for payment by instalments, he thereby discharges the bail, unless they are parties to the arrangement. *Bowfield v. Tower.* 456
2. If a non commissioned officer has been arrested and gives bail, the Court will not, after judgment recovered against the bail, set aside the proceedings and cancel the bail-bond. *Bryan v. Woodward.* 557

BANKER'S CHECK,

See EVIDENCE, II. 1.

BANKRUPT.

- I. *Of the Bankruptcy and Commission.*
- II. *Of the Bankrupt's Rights and Duties.*
- III. *Of the Bankrupt's Estate.*

I.

1. If two persons exchange acceptances, and before the bills are mature one of the acceptors commits an act of bankruptcy, there is not such a debt due from him to the other as will sustain a commission, be-

fore the other has paid his own acceptance. *Sarratt v. Austin.* Page 200

2. A trader left at his house a message for a creditor, who had in his absence called for a debt, that he could spare no money, and would not pay him that day, and would go out of the way and stay till dinner time. Held that it was for the jury to consider whether he absented himself to delay a creditor; and this evidence warranted their conclusion that he did not. 603
3. So, where he absented himself from his house, where his creditors were, to avoid irritation and harsh language. *Vincent v. Prater.* 603
4. Whether a deed of composition entered into for the express purpose of committing an act of bankruptcy, will have that effect between parties to that act. *Quare. Doe v. Lifson.* 741

II. And see ANNUITY, I. IV. 4.

1. If the assignees of a bankrupt manufacturer employ him in carrying on the manufacture for the benefit of the estate, and pay him money from time to time, this is evidence of such a contract between him and his assignees as will enable him to recover from them a reasonable compensation for his work and labour. *Coles v. Barrow.* 774

III. And see INSURANCE VI. 2, 3, 4. EVIDENCE, II. 4.

1. A trader in prison employed an auctioneer to sell goods, who sent him the proceeds by the hands of the Defendant; the trader became bankrupt by lying two months in prison.

Held

Held that his assignees could not recover from the Defendant, who was a mere bearer, the money he had so received and paid over. *Coles v. F. Wright.* Page 198

2. The stat. 49 G. 3. c. 121, § 14, which enacts that creditors proceeding under the commission shall be deemed to have made their election not to sue, does not extend to prevent a creditor who proves a joint debt under a commission against one partner, from suing the others. *Heath v. Hall.* 326

3. If the title of assignees of a bankrupt's estate, strangers to the record, comes in question incidentally, it must be proved in the same mode as before the statute 49 G. 3. c. 129, although no notice of contesting the bankruptcy has been given by the opposite party. 741

4. In proving the title of assignees of a bankrupt, if the petitioning creditor was the assignee of another bankrupt, it is necessary to prove the title of the petitioning creditor to be such assignee, by all the like proof by which the title of the assignee in question is to be proved. *Doe v. Liffon.* *ib.*

5. To enable the holder of a bankrupt's acceptances to avail himself of them in an action by the assignees against himself on his own acceptance, by way either of set-off, or of mutual credit, he must most distinctly prove, either that the obligation on himself to pay the bill so set off subsisted before the bankruptcy, or that there was a mutual credit

created in the origin of the bills. *Ouchterlony v. Engleby.* Page 888

BARON AND FEME.

See COPYHOLD, 4.

BASTARD, CUSTODY OF.

Whether the putative father of a bastard child has a right to the custody of the child, *Quere, Strangeways v. Robinson.* 498

BASTARDY BONDS.

1. A bond, conditioned for payment to the overseers of a parish of a certain weekly sum so long as a bastard child shall continue chargeable, is not illegal or contrary to public policy. *Strangeways v. Robinson.* 498

2. To debt on bond, conditioned for payment of a weekly sum for maintenance of a bastard child, so long as it should be chargeable, it is no plea, that after the child attained the age of seven years, the putative father offered thenceforth to keep and maintain the child, and requested the overseers to deliver it to him, without shewing that the child was within the power and custody of the overseers. *ib.*

3. Whether the putative father of a bastard child has a right to the custody of the child, *quere. Strangeways v. Robinson.* *ib.*

BENEFICE,

See PLURALITIES.

BILL, DELIVERY OF,

See ATTORNEY'S BILL.

BILL

BILL OF LADING,

See DEMURRAGE, 2. FREIGHT
CONSIGNOR AND CONSIGNEE, 1, 2.

BILL OF PARTICULARS,

If a bill of particulars specifies the transaction upon which the Plaintiff's claim arises, it need not specify the technical description of the right which results to the Plaintiff out of that transaction. *Brown v. Hodgson*. Page 189

BILL OF SALE,

See SHIP'S REGISTRY.

BILLS OF EXCHANGE AND PROMISSORY NOTES,

And see BANKRUPT, I. 1. DEFEASANCE. EVIDENCE, I. 5. PLEADER, III. 1. EXECUTOR, I.

1. If the payee of a bill annexes a condition to his indorsement before acceptance, the drawee, who afterwards accepts it, is bound by that condition; and if the condition is not performed, the property in the bill reverts to the payee, and he may recover the contents against the acceptor. *Robertson v. Kensington*. 30
2. A letter written by the indorser of a bill, who had been applied to for payment, after several days laches, telling the Plaintiff that he would not remit till he received the bill, and desiring the Plaintiff, if he considered the Defendant as unsafe, to return the bill to Trevor and Co. (who were prior indorsers on the bill, and also bankers at the Defendant's place of residence,) was held not to

be such a waiver of laches and promise to pay, but that the Defendant, on discovering that in law he was discharged, might refuse payment.

Borr. plaile v. Lowe. Page 93

3. Where a bill has been lost or fraudulently or feloniously obtained from the Defendant, the holder who sues must prove that he came to the bill upon good consideration. 114
4. But the Defendant will not be permitted to object to the want of such proof, unless he has given the Plaintiff reasonable previous notice, that the Plaintiff may come to trial prepared to prove his consideration. *Paisersen v. Hariducere*. id.
5. A bill of exchange written on a wrong stamp, is no payment, although the parties would have paid it if presented in due time. *Wilson v. Vassu* 268
6. The acceptor of a bill for the discharged by time given to the drawer. *Raggett v. Axmore*. 730
7. A banker discounts a bill drawn on a customer, and, by the acceptance, made payable at his bank, after notice that it has been lost by the holder, and afterwards debits his customer with the amount of the bill, writes a discharge on it, and delivers it up to the customer as the banker's voucher of his account. Held that the banker is thereby guilty of a conversion, and the loss of the bill may recover in trover without a previous demand of the bill. *Lovell v. Martin* and another. 799

3. One who without consideration but without fraud indorses a bill in which both the holder and acceptor are fictitious persons, is entitled to notice of the dishonour of the bill. *Leach v. Hewitt.* Page 731

BIRMINGHAM.

See COURT OF REQUESTS, 1.

BOND,

See ANNUITY, 4. BASTARDY BOND.

1. The extent of the condition of an indemnity-bond may be restrained by the recitals, though the words of the condition import a larger liability than the recitals contemplate. *Pearfall v. Summerfet.* 593

2. A bond, conditioned to repay to five persons all sums advanced by them or any of them, in their capacity of bankers, will not extend to sums advanced after the decease of one of the five by the four survivors, the four then acting as bankers. *Welson v. Barton.* 673

BOOK.

See TROVER, 3.

BROKER,

See LIEN, 1. FELONY, 1. INSURANCE, III. 1. GOODS SOLD AND DELIVERED, 1.

BELLION,

See NAVY, 1. SOUTH SEA COMPANY, 4.

C

CALICO PRINTER,

See TROVER, 3.

CAPE OF GOOD HOPE,

See NAVIGATION ACTS, 1.

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See MONEY PAID, 1. NAVY, 1

CASES — *observed on, questioned, explained, or overruled.*

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CERTIFICATE

See SHIP'S REGISTRY.

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See DEVISE, II. 3.

CHALLENGE,

See TRIAL, 2.

CHANCERY,

See ATTORNEY, 3, 4.

CHARTER,

See SOUTH SEA COMPANY.

CHOSE IN ACTION,

See ASSIGNMENT, 1.

COGNOVIT,

See BAIL, IV. 1.

COIN,

See NAVY, 1. TROVER, 1.

COLLEGES,

See PURSUITES.

COLONIAL EXPORTS,

See NAVIGATION ACT.

COMMISSION,

See MONEY HAD AND RECEIVED, 1.

COMMITMENT,

See ARREST.

COMMON RECOVERY,

See RECOVERY.

CONDITION,

*See BILL OF EXCHANGE, 1. DEFEAZ-
ANCE, 1. BO D, 1, 2.*

CONSIDERATION,

*See AGREEMENT, 1, 2, 3. MAR-
KIT, 3. VARIANCE, 1. ASSUMP-
SIT, 1. BANKRUPT, II. 1.*

CONSIGNOR AND CON- SIGNEE.

One of several partners in a contract with government, cannot pledge goods consigned to him by another partner for the purpose of performing the contract. *Smith v. Burridge.*

Page 684

2. The indorsing of the bill of lading, by such consignor to the consignee does not constitute a lien in favour of the latter for his advances to the consignor.

CONTEMPT,

See. REIGN ATTACHMENT, 1.

CONTRIBUTION.

1. The owners of a ship's cargo are liable to contribution, for ship's stores necessarily thrown overboard, after a vessel was captured, and while she was in the hands of an enemy. *Price v. Noble* 123

3 P 2

The

2. The accident of an owner having effected an insurance, does not affect his right to recover general average. *Price v. Noble.* Page 123

CONVEYANCE, ¹

And see COVENANT TO STAND SEISED TO USES.

CONVOY.

1. Every person who ships goods on board a vessel which sails without convoy, does it at his own peril of her having a sufficient licence for the voyage, without which all insurances on his goods are void, by the stat. 43 G. 2. c. 57 178
2. Although the owner of the goods supposed and intended that the ship should have a sufficient licence. *ib.*
3. And although he lived at a distance from the port, and had no concern with the management of the ship, or the obtaining for her the necessary documents. *ib.*
4. A licence to sail without convoy to a port which a ship must pass on her voyage, is not a sufficient licence to authorize her to run, without licence or convoy, for the residue of her voyage, after she has touched at that port. *ib.*
5. A licence to *Gibraltar* will not legalize a voyage to *Palermo*, *Messina*, and *Malta*, touching at *Gibraltar*, and finding there neither licence or convoy. *Wainhouse v. Cowle.* *ib.*
6. In order to shew that a voyage without convoy from a foreign port is illegal, it is incumbent on the underwriter, to prove that there is con-

^{4P.}
vey occasionally appointed from that port, or some one resident there, authorized to grant licences to sail without convoy. *Wake v. Atty.* Page 493

COPY,

See FINES AND RECOVERIES, A-
MENMENT OF, 19.

COPYHOLD.

1. A copyholder claiming an interest, may have inspection of the court rolls without proving an interest. *Bateman v Phillips.* 162
2. A feme covert, who surrenders copyhold lands, ought previously to be examined separately from her husband, by the steward of the manor. 294
3. But by special custom she may be separately examined before two customary tenants. 294
4. If a copyhold be surrendered to such uses as a feme covert shall, by will or codicil, appoint, a paper purporting to be a will, though made by her, living her husband, is a good execution. *Driver v. Thompson.* *ib.*

COSTS,

- I. When payable by and to persons in general.
 - II. When payable by and to particular persons.
 - III. Of staying proceedings till costs paid or security given.
 - IV. Set-off.
 - V. What costs are payable.
- I. And see MALICIOUS ARREST, I.

INDEX TO THE PRINCIPAL MATTERS.

1. If a Defendant pleads a justification in trespass, and the Plaintiff, without traversing it, now assigns a trespass, no abatement of his title, &c., on a writ of *assumpsit* joined, and found for him, he is entitled to no more costs than damages, under 22 *Car. 2. c. 9. s. 13*. *Gregory v. Primmer*.

Page 99

2. Upon the pleas of *non assumpsit* and *plene administravit* the Plaintiff joined issue, and omitted to pray judgment of assets *quando*. The first issue being found for the Plaintiff, and the second for the Defendant, the Defendant is entitled to the *posse* and general costs. *Hogg v. Graham*. 135
3. If a Defendant pays money into court which the Plaintiff does not take out, but proceeds, and the Defendant obtains a verdict, the Defendant is entitled to full costs of the whole action. *Jeffs v. Smith*. 196
4. Although a Defendant succeeded upon the first trial by a forgery, the Court cannot give the Plaintiff, succeeded on the second trial, the costs on both. *Cole*. 671

II. See ATTORNEY, I. BAIL, II. 1.

IV.

1. If, upon the reference of an action in this court, the arbitrator awards the costs of a nonsuit to be paid by the one party, and a larger sum to be paid as a debt by the other party, the party awarded to pay the smaller sum is entitled to a set-off without motion. 632
2. And if payment of the smaller sum

is enforced by attachment, the Court will set the attachment aside. P. 632

3. The like set-off in case of cross-judgments for debt or damages and costs. *Figes v. Adams*. *ib*

V. And see PRACTICE, VII. 3.

1. The costs of bringing over a necessary witness from the continent to this country are to be allowed in future. 55
2. But not the costs of his return. *Cotton v. Witt*. *ib*.
3. A plaintiff who brings over a foreign witness hither, in order to judge by his testimony whether there ground to bring an action, and afterwards sues and examines the foreigner at the trial, may be allowed the costs of detaining him here from the time of the writ sued out until the trial, and a reasonable sum for his sustenance here during the same time, but not the costs of his passage hither, or of his return. *Schimmel v. Lousada*. 695
4. Otherwise in *B. R.*, where the costs of his return are also allowed, though not of his coming hither. Resolved in same case. See *Tremayne v. Barrett*, *post. Hil. T. 1815. vol. 6.*
5. The Court will allow the costs of detaining a foreigner here to give evidence upon a trial, computed from the day of the writ sued out to the day of trial. 697
6. The practice of the Court of King's Bench is the same. *Sturdy v. Andrews*. *ib*.

COVENANT,

And see ANNUITY, 1. ACTION UPON THE CASE, 4.

1. The several covenant of one grantor of an annuity is not avoided by the infancy of another grantor to the same deed. *Haw v. Ogil.* Page 10

2. A covenant in an annuity deed, made prior to the stat. 46 G. 3. c. 65. §. 115, which statute has a retrospective operation, whereby the grantor of the annuity covenanted to pay the same on the days and times, &c. without any deduction whatever out of the same, or any part thereof, for or in respect of the then present or any then future property-tax, is void in respect of its obligation on the grantor not to deduct the property-tax, but not in respect of the payment of the annuity, subject to such deduction. *Readshaw v. Balders.* 57

Where the Defendant, by indenture made since the passing of the 46 G. 3. c. 65., demised to J. H. certain premises, *reddendo* 40*l.* annually, clear of land-tax, *property-tax*, &c., and J. H. covenanted to pay the said yearly rent *in the manner then*

reserved to be paid as aforesaid, and to pay the land-tax, *property-tax*, &c.: Held that by §. 115, coupled with §. 195. of the said act, so much of the *reddendum* and covenant as stipulated for payment of the rent clear of deduction on account of property-tax was void, but the residue was good, for payment of the rent, subject to such deduction; and therefore the Plaintiff, who had paid a deposit as

purchaser of the said rent, was not entitled, on the above ground of objection, to recover back his deposit from the Defendant, *ven* engaged to make a good rent of the said rent. *Fuller v. Abbott.* Page 105

4. If a lease contain a covenant for quiet enjoyment against the lessor and those who claim under him, the lessee cannot upon an eviction by a paramount title recover under the implied covenant for general title implied in the word demise. *Morrill v. Frame.* 329

A trustee, to whom two leases were assigned in trust for securing an annuity, having said to the occupier of one of the demised houses, "You must pay the rent to me; I am become landlord for my client who has the annuity, and you must pay the ground-rents for me." Held that the trustee was liable in covenant to the lessor, as assignee of both leases, for non-payment of rent and not replying. *Gretton v. Diggles.* 766

6. In covenant for rent

pleaded certain premises, for the whole of which the Plaintiff, his lessor, had covenanted to pay rent to the landlord paramount, and shewed that he, the Defendant, paid to the landlord paramount, under threat of distress, more rent than he owed to the Plaintiff; the Plaintiff traversed that any rent was due from himself to the landlord paramount: Held that this replication was not supported, by proving that the Plaintiff had assigned his term in the residue of

of the premises to K., who assigned them to the Defendant, who covenanted to pay in discharge of the Plaintiff the whole rent reserved to the landlord paramount. *Sturges v. Farrington.* Page 61.

COVENANT, TO STAND SEISED TO USE.

1. A deed which may take effect as a covenant to stand seised, is good, though the use is to arise after the decease of the covenantor, and though he does not affect thereby to dispose of the freehold in the meantime.

2. And although the use is to arise at a period which may not happen till long after the covenantor's death, the use resulting in the meantime. *See, on demise of Dyle, v. Wentingham.*

COURT OF CHANCERY,

See ATTORNEY, 3, 4.

COURT OF EXCHEQUER,

1. An action of trespass inferior military officer against his superior officer, (both being under martial law,) who imprisons him for disobedience to an order made under colour, but not within the scope of military authority. 67

2. Although the imprisonment be followed by a trial by a court martial. *Warden v. Baily.* 67

3. Jurisdiction of court martial, *Anon.* 72. and *Moore v. Bassard.* ib.

COURT OF REQUESTS.

1. No person to whom any debt of certain descriptions, not exceeding 5*l* is owing from any person resident within the jurisdiction of the Birmingham Court of Requests, can recover any costs, if he sue elsewhere than in that court. Page 150

2. Wherever the Plaintiff may reside, and wherever the cause of action may accrue. *Lee v. Rogers.* ib.

D

DAMAGES,

See MALICIOUS ARREST, 1.

The Court may assess the damages *ex officio* upon judgment by default, with the assent of the Plaintiff, without the intervention of a jury. *Gold v. Hammerley.* 148

DEATHS, 122.

DECEIT,

See ACTION UPON THE CASE, 1, 5, 6.

DEFAMATION,

See SLANDER, 1.

DEFEAZANCE.

Upon a note of hand the payee indorsed, that if the interest was paid on stipulated days during her life, the note should be given up. A payment of the interest being omitted,

and action commenced on the note, held that the Court had no power to stay proceedings on payment of the interest and costs. *Steel v. Bradfield*. Page 227

DEMURRAGE.

1. The master of a ship cannot maintain assumpsit in his own name upon an implied promise to pay demurrage. *Brouncker v. Scott*. 1
2. If a consignee accept goods under a bill of lading, at the bottom of which is a memorandum that the ship is to be cleared in 16 days, and 8*l.* per day, demurrage to be paid after that time, the master upon delivery of the goods may recover demurrage against the consignee. *Jessou v. Solly*. 52

DEVASTAVIT,

See EXECUTOR, I.

DEVISE,

- I. *By what words lands, &c. pass.*
- II. *What estate.*
- III. *Revocation.*

II.

1. A devise of all my estate of *Ashton*, passes á fee-simple, as descriptive of the interest devised, not merely of the situation of the land. *Chichester v. Chichester*. 176
2. Devise to two jointly to be divided between them for their natural lives, and after their decease, to such child and children of the two, of their bodies lawfully begotten, share and

share alike; and in failure of such issue, to such child of *W. C.*: ther being a child of one of the two living at the time of the devise, and death of the testator, this devise creates an estate for life in the two, and the same in the child; and the remainder over failing, the heir at law of the testator took the fee. *Doc v. Gunnist*. Page 313

3. Devise to *A.* in trust to permit and suffer the testator's widow to have, hold, use, occupy, possess, and enjoy the full, free, and uninterrupted possession and use of all interests of movables in the funds, and rents and profits arising from the testator's houses, for her natural life, if she should remain unmarried; and that her receipts for all rents, &c., with the approbation of any one of his trustees, should be good and valid, she providing for and educating properly the testator's children, and also paying two annuities thereby bequeathed to *M. D.* and *M. I.* of 20*l.* for their lives, besides board and lodging to *M. I.*, and that his children should be

of certain ... Held that ... was executed in the devisees in trust. *Gregory v. Henderjon*. 772

